THE LAW REPORTER.

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LAW STUDIES.[1]

We have but little faith in works upon law studies, and regard their multiplication as an injury rather than a benefit to the legal profession. We were never able to read a book of this description through; and we confess, in the outset, that we have not even undertaken the popular work of Mr. Warren, the praises of which have been sounded throughout the land with a unanimity of vociferation that tells of a cheap edition, profusely distributed amongst those guardians of the public taste, whose principles of criticism are usually equal to their literary integrity. We never could regard these works in any other light than as unsafe inventions to overcome the difficulties of an arduous profession in some illegitimate manner — as sort of patent medicines for chronic idleness. They seem to be well adapted to a class of men who spend half their lives in making plans and constructing theories in relation to the other half, and who finally go down to the grave without accomplishing anything which deserves the name of professional success — men who are forever reading books upon some approved "plan," and are entire strangers to deep and earnest thought. The truth is, that all young men, when entering upon legal studies endeavor to conceal from themselves the disagreeable fact, that the only road to success is attended with trials and struggles, doubts

[1] A Popular and Practical Introduction to Law Studies, &c. &c. By Samuel Warren, Esq., F. R. S., Barrister at Law, of the Inner Temple. Second edition, entirely remodelled, re-written, and greatly enlarged. A. Maxwell, London, 1845.

and difficulties, toils and privations. Every one fancies that his own case is peculiar. He may avoid the rough and thorny path; he has brilliant talents; genius in abundance, and friends to assist. And if to all this he begins to rely upon new inventions — rickety machines — plans for study, commonplace books, and other contrivances invented by lazy lawyers, men of "masterly inactivity" — his history may be written before he is called to the bar. But the real truth will still exist and be acknowledged by the few, that the only certainty of success is to be found in that live-like-a-hermit, and work-like-a-horse policy, which was recommended by the greatest lawyer of his age.

An acknowledgment of this truth, and a determination to adhere to it, is the first element of success in our profession. The manner in which it is to be *applied* in each individual case, must be judged of by every one for himself. How he is to study, when, what hours, and in general, his *course of study*, he must learn for himself. His age, position, health, mental calibre, habits of thought and power of application, are all to be considered, and must be considered by *himself*. No one else can tell him. It is very doubtful if others can assist him; and if he has not wit enough to learn this first lesson without assistance, he had better abandon all thoughts of the profession at once. Men of equal ability, from their very constitution, differ entirely in regard to everything that relates to reflection. One man naturally studies a science analytically; he regards the whole subject at once; he begins at the foundation and studies upward, and through. Another man has no patience for such a slow, consecutive process. He studies the science by subjects; he seizes upon a point and follows it out, investigating every part of it and all that bears upon it, until after a series of such investigations he is able to take a comprehensive grasp of the whole. This is peculiarly the case in our profession. One lawyer has examined the whole law systematically; another, with equal industry, has investigated different subjects as they arose; he has studied case after case, until at length he is as good if not a better lawyer than he who has been more systematic in his plan.

Now, we will not undertake to say, that some general directions to a person commencing study may not be useful to a certain extent; but the difficulty is that every writer, unconsciously perhaps, but actually, is giving his own experience; the food he prescribes is the food which agrees with his mental digestion, and if he be a man of great facility in composition or great aptness at reading books, it will turn out that until our lives are restored to the ante-

diluvian span, any one who follows his scheme of legal education, will find himself in the midst of his preparatory studies at the end of his life. On evidence, says Mr. Warren, (as we learn from one of the reviews) one should read Greenleaf, Starkie and Phillips, (what else *can* he read on the subject ?) ; on bills, Bayley and Story ; on contracts, Pothier, Chitty and Story ; Smith's mercantile law, Abbot on shipping ; on real property, Williams, Hayes, Shepherd's Touchstone, Walliston, Woodfall, Coke upon Littleton, and so on to the end of the chapter, enumerating books enough to fill a large library, which the student is to read, and at the same time, study history, political and moral philosophy, metaphysics, political economy and logic, medical jurisprudence, trade and commerce, arts, sciences and natural philosophy, following which are sundry suggestions as to the expediency of perfecting oneself in algebra, mathematics, geometry, chemistry, and mechanics, as parts of "the course of *general* study which the author ventures to lay down." He might have added literature in general and "Ten Thousand a Year" in particular. That some men have done all this before coming to the bar we will not venture to deny, but that they ever *accomplished* anything *at* the bar we do not believe, unless they forgot a great deal that they had read, and made a change in their mental habits. Such men may be delightful companions, and write pleasant books, but to *try cases* with such a crude and undigested mass of learning in their heads, they would succeed about as well as an alderman at cricket or leap frog after the Lord Mayor's dinner, or a circus-rider clothed in ancient armor.

We have said that we had not read Mr. Warren's work, and it can be no part of our present purpose to express an opinion upon its peculiar merits.[1] We have repeatedly heard that it was a very readable book, and we have no doubt that it contains many valua-

[1] "I have observed," says the Spectator, "that a reader seldom peruses a book with pleasure, until he knows whether the writer of it be a black or a fair man, of a mild or choleric disposition, married or a bachelor, with other particulars of a like nature, that conduce very much to the right understanding of an author." There are few men of our profession abroad of whom this is more true than of Mr. Warren. We understand that he is a barrister, nearly fifty years of age, in a respectable but somewhat limited business, and is neither remarkable for learning or tact in his profession. He is a nervous person and not prepossessing in his personal appearance, nor popular with the bar, who tell many laughable stories at his expense. One of the best things which he did, in his own estimation, was to write an article in Blackwood's Magazine several years ago, in which he ran a parallel between Lords Brougham and Lyndhurst, much to the disparagement of the former. An invitation to dinner subsequently by the latter, and the election of Mr. Warren, are a part of the gossip of the English bar. His "Diary of a London Physician,"

ble suggestions. A late number of the London Law Magazine contains a well written and sensible review of the work, with a long extract from which we close these remarks.

"We believe there are few greater errors about education than that legal knowledge for any practical purpose can be best acquired by intense reading. If books were tersely written and designed to convey the precise information the reader is supposed to require, and the titles of books profess to give, the case would be different. But the fact is far otherwise. Books are written far less to instruct the reader than to puff or profit the writer. This is not unfrequently the case even with the best sort of books, but it is invariably so with the inferior ones.

How fearfully ill off are lawyers in this respect; what a wretched description of text book we are inflicted with! What cumbersome strings of marginal notes, *indigestaque moles!* We know nothing more appalling to one's senses than the sight of a new text book,

Monstr' horrend' inform' ingens, cui lumen ademptum!

Every man who sets to work to write a book on law, finds (if he has any brains) that he can digest the *principle* and the real pith of the subject into the compass of a small or very moderate sized book. It is especially so since subjects have been so much divided. But this plan suits neither the author's pride nor the publisher's pocket. The book must be big, to sell and to be thought of. The result is obvious; prolixity is aimed at instead of avoided; heaps of long cases are pitchforked together to swell the book; and even where the author has more cautious care of his reputation, and aspires to be something above a mere book-builder, and draws from his own stores as well as Harrison's Digest, what redundancy of verbiage and amplification of reasoning we find! Even Blackstone's Commentaries, which Mr. Warren lauds and magnifies, is a most provoking instance of prolixity. We engage to put the whole substance, strengthened by compression, of any one of these four volumes into half the same compass. Where works (as nearly all do) take a more circumscribed range of subject, how

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and more recently, his novel of "Ten Thousand a Year," gave him considerable reputation in the literary world, and the latter excited much attention not only for its own intrinsic merits, of which it has many, but also from the fact that most of the characters are drawn from life. Mr. Hayward, the former editor of the Law Magazine, in particular, is subjected to unsparing ridicule. When this book was published the author was tried in the bar mess on one of the circuits under the person of Mr. Sergeant Talfourd's servant; the charge being that this servant had written a certain false, scandalous, malicious and ridiculous book called "Ten Thousand a Year." He was convicted and sentenced to death, but on a pathetic appeal by Mr. Talfourd, who testified to the good qualities of this servant, and promised for him that he would never be caught writing such a book again, the punishment was changed to transportation! Mr. Warren was present, and the bar took ample revenge for the ridicule cast upon some of their number by the author, and pleased themselves at the same time. It is not probable that Mr. Warren's legal reputation will ever be equal to his literary. A gentleman who happened to be present at the argument of *Saunders* v. *Smith*, (3 Mylne & Craig, 711) when Mr. Warren appeared for the first time at the chancery bar, stated in our hearing, that his appearance was not graceful or prepossessing, and although he sustained himself very well the first half hour, he afterwards flagged and provoked the smiles of the older members of that bar.

intolerable is this defect increased, and the evil of it heightened. We do not hesitate to say, that to gain a given amount of really available knowledge on any branch of law, a man, if he wishes to acquire it by reading in the accustomed channels of information, must wade through four times the amount of words necessary to give it to him, even if he make the best selection from existing books.

But the evil is not confined to the superfluous labor and waste of time. This is but half the mischief; the mind is encumbered with a confused mass of matter which often defies analysis, diminishes the vigor of apprehension, and materially deadens the appetite for information. It discourages research, and begets superficial knowledge; for the mind, baffled in its efforts to generalize and digest, retains only fragments of subjects, and dim and uncertain perceptions are substituted for that clear apprehension and steady grasp of definite principles which alone render acquirements in any study or science practically useful and of permanent value. In short, no knowledge otherwise acquired is worth the name of knowledge. Now to this spurious and worthless superficiality there is no surer means than to read a vast number of books. "You seem to have read very little," said the sciolist; "if I had read more," was the answer, "I am afraid I should have known as little as you do."

We admit (but not without some misgiving) that it may be advisable for the law student to read Stephens' Blackstone, Williams' Elements of Real Property Law, Smith's leading Cases, Stephen on Pleading, and Mr. Warren's Introduction to Law Studies, as a preliminary preparation for his more profitable exercises. These will occupy a few months; at least they ought to do so; for many parts of these books require to be read twice over. Then, if the student aims at being a really competent practitioner, prompt, versed, and learned, let him plunge at once *in medias res;* let him give to the winds all that Mr. Warren says about all sorts of reading on all sorts of subjects, pertinent and impertinent, and betaking himself to a pleader's chambers, grapple at once with actual business, taking especial care to ask for the easiest papers at first, and moreover to attend to cases for opinions. Let him eschew text books as he would poison; they give little but valueless abstractions. Let him in all cases drink deeply of the reports; there it is that he will find real law, in the splendid judgments of the first common lawyers this country has ever known. Let students dig deeply into this mine of sterling thoughtful reason. But let this be done in actual practice, or for a present purpose: no man can possibly retain what he reads without any definite object nearly so well as that which he works up for practical application to work in hand. This system calls forth and strengthens the power of discrimination, which no vague objectless reading does; for every case referred to must be nicely examined, and the principle it develops well considered, in order to ascertain how far it applies to the case in question. In this way, stores of law are not only acquired, but retained. As to text books, they are little else than bad indexes. Harrison's Digest is the true index, the Reports the sole trustworthy text. Let the student especially read, mark, learn, and ponder over those judgments in the books which dive into principles. Obsta principiis. Dicta are comparatively useless to the learner; they will but little assist the judgment; and to the judgment and the reason must the lawyer trust for the application of that which depends on principle and is the essence of reason. Nothing is less arbitrary than our glorious common law.

The judgments of Lord Mansfield, Lord Kenyon, Mr. J. Bayley, and Lord Tenterden outlive their time, and will endure as monuments of law forever. Why? Because they lay down *principles*. Let the student especially mark these match-

less emanations of great minds. In our own day, the judgments of Tindal, C. J., Lord Denman, C. J., and the late lord Abinger, C. B. are worthy successors, and we have often heard it said, that there is no better study than the judgments of Tindal C. J., which begin in sixth Bingham and run through the subsequent Reports. We do not recommend any such consecutive reading: knowing its necessarily tesselated character. It is much better to read the great judgments upon given points as they occur, and gather in and store the various principles by which they are determined.

This, we humbly submit, is the way to study law. Practice of all sorts is best learnt in court; more is learnt there in one day of practice than by a month's reading through Tidd, Lush, Chitty, & Co. It is impossible to remember the dry rules of practice books. Pleading also is mostly an acquired art, the result of practice; its principles are tolerably defined by Stephen, and are not very recondite.

We have thus briefly sketched the mode in which law may be most readily and permanently learnt. As to general reading, — history, political economy, the sciences, &c. &c., it is to be presumed that they have been studied long before, and that a man does not enter for the Bar until he is decently educated. If not, all we can say, with great deference to Mr. Warren, is that the student will have little time for anything of the sort. Mr. Warren's advice that he play at chess is very much more to the purpose. No doubt fifty other things are instrumental to the success of a lawyer's studies; mathematics for the general vigor of the reason, and horse-exercise for his bodily health. But excellent as these things are, they really form no portion of law studies, though much more ancillary to them than history and a variety of Mr. Warren's collateral prescriptions. In order to fortify our protest against the regime prescribed by that gentleman (to whose merits we wish to do every justice), let us give a running summary of what he actually advises the student to study. Having dilated at considerable length upon history, political and moral philosophy, metaphysics, political economy and logic, medical jurisprudence, trade and commerce, arts, sciences and natural philosophy, as studies which are "essential to constitute a superior member of society, especially of so important and conspicuous a profession as that of the Bar," there follows in addition sundry suggestions as to the expediency of perfecting oneself in algebra, mathematics, geometry, chemistry and mechanics, as parts of "the course of *general* study which the author ventures to lay down," after much consideration, experience and anxious inquiry for the guidance of his younger brethren.

For the purpose of mental discipline, Mr. Warren backs Lord Bacon's recipe — mathematics: "Pure mathematics do remedy and cure many defects in the wit and faculties intellectual; for if the wit be dull, they sharpen it; if too wandering, they fix it; if too inherent in the sense they abstract it." Sound and serviceable truths! But Mr. Warren does not stop here. "Geometry will afford to the young lawyer the most apposite examples of close and pointed reasoning." The four first books of Euclid will amply suffice for any such purpose. Logic and Dr. Whateley figure next; while Chillingworth, Paley and Butler bring up the rear of what Mr. Warren terms "the altitudes;" from these his "practical humor" descends to the amusements of the student, which he thinks may contribute to the discipline of his mind, and "chess, whist, and cribbage" are enlisted into the service. Having thus exhausted his powers of prescription, it suggests itself to Mr. Warren that "possibly an impetuous, or sneering or desponding reader" may murmur, "what a fuss all this about a trifle! Is there

one man out of twenty of those who have succeeded at the Bar who ever went through such 'training' and 'drilling' as you are urging!" To which very natural remark Mr. Warren makes this singularly lame reply. "Perhaps they did *not* adopt the particular means here suggested. They were men probably of great natural abilities, &c. &c. Look, however, hesitating student, *not at those who have succeeded*, but at those who have FAILED." Now it appears to us that if the successful men have succeeded without following Mr. Warren's prescribed course, it is a pretty strong inference that that course is not essential to success; and that however inconvenient it may be for Mr. Warren's theory, they are precisely the persons to whom we ought to look in order to test the elements of success. No, says Mr. Warren, look to the failures of those who "perhaps would have splendidly succeeded, had but some experienced friend stood beside them at starting, whispering such directions as we have here humbly endeavored to offer." "See," said the quack doctor, as a funeral passed his rostrum, "see the consequence of not taking my specific!" The reasoning, though not the illustration, appear to us precisely analogous."

Recent American Decisions.

Supreme Judicial Court, Massachusetts, November, 1845, *at New Bedford.*

WILLIAM WILBOR *v.* BENJAMIN W. WILLIAMS ET AL.

In an action for a libel, where it appeared that the defendants had described the effects of the plaintiff's business of selling rum under the head of a "Dream," a motion to strike out and disallow the specifications of defence, as being indefinite, evasive, and otherwise insufficient, was overruled.

Evidence that the words alleged to be slanderous were understood by witnesses to refer to the plaintiff, was held admissible.

Evidence was also held to be admissible on cross-examination, that the witnesses understood the words in a figurative sense.

Evidence that the plaintiff's business was that of keeping a tippling shop, and that the effects were very injurious to his customers, was held admissible, though the defendant had not directly pleaded a justification.

Evidence from medical witnesses, clergymen, and books, of the usual effects of drinking spirituous liquors, was also held to be admissible.

It was *held*, that if the printers printed the paper, and handed it to the editor and publisher in the regular course of business, knowing that he intended to publish it, or permitted him to take it with a like knowledge, and he afterwards did publish it, this was a publication by the printers.

The jury were instructed to apply the same rules of interpretation to the alleged libel, which they would if reading it at their own firesides, and to judge of it as a whole.

Held, that if the plaintiff, in his innuendoes in certain counts, had set out a meaning essentially different from the true meaning, he must fail on those counts, even though the paragraph complained of were actually libellous.

Held, also, that if the plaintiff was pursuing an illegal vocation, and the publication was of him solely in relation to his employment in such vocation, the plaintiff could not maintain his action; but that, if the publication attacked the plaintiff in any other respect, or charged him with any offence not within the scope of that business, the defendants were liable in an action for damages.

This was an action for libel, tried at New Bedford, in November last, before Hubbard, J. The plaintiff, at the time of the publication of the alleged libel, and for a long while previous thereto, was an extensive grocer in Taunton, in the county of Bristol, and sold, among other things, large quantities of spirituous liquors by the barrel, keg, and glass. He had not received a license from the county commissioners, to sell spirituous liquors, according to the provisions of the 47th chapter of the Revised Statutes. In the month of January, 1845, the defendants, one of whom was the editor and publisher, and the others the printers, of a newspaper issued at Taunton, called "The Dew Drop," published in the columns of that paper a long article, bearing the caption, "A Dream," in which they stated, that having fallen asleep, "we dreamed the following dream. We were in Rum Hollow, and by some irresistible impulse were drawn into that house of human slaughter, kept by one Wilbor." After installing "the incarnate devil" as "the presiding genius of the place," whom they represented as occupying an elevated seat in the back part of "this indescribable hell," and from whose mouth were issuing flames of fire, which withered and scorched the deluded wretches who had been enticed within by the intrigue and cunning of "the devil's agent, whom we recognized as Wilbor," &c., the dream proceeds to describe the interior. "Around the store were arranged casks and barrels, some of which were inscribed, in flaming characters, as follows; Man killer — maniac beverage — orphan maker — soul destroyer — delirium tremens," &c. &c. Signs were nailed to the walls of the shop, bearing glowing epithets, such as, "men trained here for the gallows," "lessons given in suicide," "children instructed in the road to death," &c.; and, "directly over the place where Wilbor stood, were suspended a skull and cross-bones." After completing a vivid sketch of the interior of the establishment, the publication gives a picture of its inmates and customers. It describes, among others, a young man with swaggering gait, blasphemous lips, blood-shot eyes, matted hair, and clad in rags, who, with a desperate effort, reached the counter, and called for a glass of *mania a*

potu. It was furnished him. Upon drinking it, "he immediately fell upon the floor a raving maniac." It describes another person, who, with palsied limbs and haggard countenance, the very picture of despair, "called for a glass of Lucifer's elixir. At this moment a fiendish chuckle was heard, and Wilbor, *looking towards the devil, placed his thumb upon his nose, and with a significant look which was answered by his majesty,* proceeded to pour out the burning liquid. The man drank to the bottom of the glass, and with a horrid yell fell down dead upon the floor. His pockets were immediately rifled of their contents, and lest life should not be entirely extinct, another glass was poured down his throat." After some further sketches, the publication concludes with the words, "Was it all a dream?"

The plaintiff declared under three counts, setting forth the article with a great variety of innuendoes. He averred general losses in trade in consequence of the publication, but did not give the names of any persons who had ceased to deal with him. In that part of the publication describing the man who fell down dead on the floor, the plaintiff, in all his counts, omitted the words which we have put in italics. In his innuendoes, he averred in one count, that the defendants in this part of the dream meant to charge the plaintiff with having administered some deadly poison to one of his customers, knowingly and wilfully, whereby he died — and in another count with committing the crime of murder — and in another, with designedly taking the life of some person, with the intent thereby to rob him of his money — and in all the counts, with robbing the dead. The damages were laid at $3000. The defendants pleaded the general issue, and filed a statement of six special grounds of defence, in which they alleged, that the publication was made solely in regard to the traffic in spirituous liquors, in tippling-houses and dram-shops — that at the time of the publication, the plaintiff was engaged in such traffic, in violation of law — that the article was not intended to be and was not in fact a literal description of things seen and events which transpired, but was an allegorical delineation of the nature and tendency of the traffic in such liquors in tippling-houses and dram-shops, and of the effects of such liquors upon those who there use them to excess — that the terms and epithets employed were not literal descriptions of the persons engaged in such traffic, nor of the kind of liquors sold in such shops, but metonymical descriptions of the occupation of such persons, and of the tendencies and effects of such traffic, and of the excessive use of such liquors — and that as thus understood, the publication was true, and was a justifiable criticism upon the plaintiff's vocation.

The counsel for the plaintiff moved the court to strike out and disallow the specifications of defence, as being indefinite, evasive, and otherwise insufficient to entitle the defendants to give evidence in justification of the publication. The court overruled the motion. It was in evidence that there were two men by the name of *Wilbor*, who kept liquor stores in that part of Taunton, called "Rum Hollow." The plaintiff offered to prove by witnesses, who read the dream on its first appearance, and were acquainted with the shops of both the Wilbors, that they understood it as referring to the plaintiff. This evidence was objected to by the defendants; but was ruled to be competent, on the ground, that in actions for slander and libel, the question for the jury to decide was, how were the words or the publication understood by the hearer or reader? The defendants (the evidence being objected to by the plaintiff, and ruled in) cross-examined these witnesses as to whether they understood the publication taken as a whole, as a literal or figurative piece of writing. Their attention was called to particular passages, such as that of the man who became a maniac, and the man who fell down dead, and they were permitted to say (though the evidence was objected to by the plaintiff) whether they understood those passages literally or figuratively.

The defendants produced evidence of the general character and extent of the plaintiff's business — that he sold large quantities of spirituous liquors — that great numbers of intemperate men were generally in and around his premises, in various stages of intoxication — that children were frequently seen there in search of, or purchasing liquor for, a drunken father — that some of his regular customers had been sent to the poor house, the jail, the house of correction, and some had died of delirium tremens and insanity — that he kept a noisy, brawling shop, which disturbed the neighborhood with fighting and blasphemy — that it was open till a late hour at night, and customers were admitted on the Sabbath, &c. &c. This evidence was strenuously objected to on the part of the plaintiff on the ground, that the defendants were thereby seeking to prove the truth of the libel in an indirect manner, when they had not distinctly pleaded a justification; and also that the evidence was a covert attack on the plaintiff's character, by attacking his business. After argument, it was ruled by the court to be admissible, as tending to prove that the plaintiff sold liquors in violation of law, and kept a tippling-house and dram-shop; also, as going to show what was the general character of his business, and whether the publication was a just description of, and a fair criticism upon it; and, inasmuch as the plaintiff had averred in his de-

claration that the publication had injured him in his business, the defendants might show what that business was in mitigation of damages. On these points the following authorities were cited by the defendant's counsel. 1 Starkie on Slander, (Wendell's ed.) Introduction, pp. 33, 34, 46, 47; *East* v. *Chapman*, (2 Carr. & P. 570); 2 Starkie on Slander, 99, 100, *notes, a a* and (1); *Larned* v. *Buffington*, (3 Mass. R. 546); *Stone* v. *Varney*, (7 Metcalf R. 86.)

The defendants offered to prove by medical men, and by clergymen, and by the chaplain of the state prison at Charlestown, what were the usual effects of excessive drinking upon the bodies, the health, the souls, the morals, the habits of men — that intemperance shortened human life by causing disease, by producing delirium tremens and other forms of insanity, by inducing suicide, by instigating murder and crime generally, and therefore, in figurative language, these liquors were properly called, "man killer," "maniac beverage," "delirium tremens,"— that they destroyed parents, and so were an "orphan maker"— that the children of intemperate parents were more apt to become drunkards than those of sober parents, and so these liquors "instructed children in the road to death"— that tippling-houses and dram-shops furnished a large share of the victims of capital punishment, and were a fruitful source of insanity, and therefore they might be said to train men for the gallows, and give lessons in suicide, &c. &c. This evidence was objected to by the plaintiff on grounds similar to those stated above, and on the additional ground, that the evidence was proposed to be obtained from secondary and insufficient sources. But, after argument, it was ruled to be admissible to go to the jury, in connection with the question, whether the epithets in the dream, sought to be thus explained, were to be understood literally or figuratively: and if figuratively, then it was for the jury to say whether this evidence proved them to be true. The authorities cited to these points by the defendant's counsel, in addition to the foregoing, were, 2 Starkie on Slander, (Wendell's ed.) 52, 84, 85, 86; 1 Starkie, 462. And *Commonwealth* v. *Cheever*, (MS. tried at Salem, in 1835.) Besides the results of his experience and observation, founded on such cases as had fallen under his own eye, a medical witness was permitted to detail facts which he had read in books of good authority, and also to give his opinion of the proportion of diseases, and the number of deaths annually in this country, caused by intemperance. The chaplain of the state prison was permitted to give his opinion of the average amount of crime produced by the same cause, but was not allowed to give the de-

tails in regard to particular convicts, unless the facts had fallen under his own observation.

In was in evidence that two of the defendants were merely *printers* of the Dew Drop; that they were job printers, and printed another paper also, and frequently printed books and handbills, &c.; that they had not any pecuniary interest or property in the Dew Drop, and did not sell it, but that, after the whole weekly edition was struck off, it was all taken away at once by the editor and publisher, and was sent to subscribers and sold by him.

In closing the case on the part of the defendants, their counsel contended, that the publication was manifestly an allegory; that, while it had a meaning, *prima facie* it was not a *literal* meaning; that that kind of writing should never be subjected to a forced and contradictory construction; that one part should not be regarded as figurative and another literal; that, while it was for the jury to decide what its true meaning was, yet the best criterion for them to arrive at this was, to inquire, How would an intelligent reader, acquainted with the subject-matter, with the feelings of the writer, appreciating his motives and objects, and skilled in that sort of composition, have understood him? Applying these rules of interpretation to the dream, the jury must be satisfied, from the evidence, that it was true. In regard to the paragraph concerning the young man who fell down dead, he contended, 1. That, if the jury should be of opinion that the plaintiff, by omitting the words printed above in italics, had altered or obscured the sense of the paragraph, then he must fail in this part of his case; for he had set out another libel than that which the defendants uttered. To this point, he cited 1 Camp. R. 352, 353, and 1 Starkie on Sl. (Wendell's ed.) 377, 380, 381, and note (*c*). 2. He contended that the plaintiff was bound by the meaning stated in his innuendoes; and, if the jury should be of the opinion that this paragraph meant something essentially different from the meaning set out in the innuendoes, then he must so far fail in maintaining his action. 3. That, in view of the general scope of the whole article, this passage should be regarded as a mere fancy sketch; or, at most, as only a statement of what might naturally occur in a low tippling-house and dram-shop. This part of the dream was thought to be the most difficult to justify, and was considered by the plaintiff as an impregnable point in his case; and that, however it might be with other parts of the publication, this must be regarded as a literal and specific charge of the crimes of murder and robbery.

On the question of damages, the defendants' counsel contended,

that, though the plaintiff had averred loss of trade by reason of the libel, yet, not having set forth nor proved that any particular customers had left him, he could recover no special damages on that account. He cited 1 Chitty's Pleading, 285; 2 Starkie on Sl. (Wendell,) 63, 64.

One of the main grounds of the defence, and which was argued at length on both sides by the respective counsel who closed the case, was this: 1. The plaintiff, at the time of the publication, and previous thereto, was engaged in the traffic in spirituous liquors, in violation of law, he not being licensed therefor; and was the keeper of a tippling-house, also in contravention of law. 2. The publication was made of him solely in reference to his agency in the sale of such liquors, and in such a house. 3. That a party could not maintain a civil action for damages for a libel upon him in an illegal vocation. And the counsel for the defendants requested the Court so to charge the jury. He cited the following authorities to this point: *Hunt* v. *Bell* (1 Bing. 1); *Manning* v. *Clement* (7 Bing. 362); *Yrisarri* v. *Clement* (2 C. & P. 223); *De Wutz* v. *Hendricks* (2 Bing. 314); *Tabbart* v. *Tipper* (1 Camp. 350); Stephen's Nisi Prius, 2222; 2 Starkie on Sl. (Wendell) 87; 1 Starkie, 230, note *b*; *Commonwealth* v. *Cheever* (MS. argument of Attorney-General). The counsel cited the following cases, as laying down rules based on the same principles as that for which he contended: *Paul* v. *Frazier* (3 Mass. 71); *Bush* v. *Brainerd* (1 Cowen, 78); *Riddle* v. *Proprietors, &c.* (7 Mass. 183); *Girardy* v. *Richardson* (1 Esp. R. 13); *Walcot* v. *Walker* (9 Vesey, Jr. 1); and the cases, condensed in 6 Petersdorff's Abridgment, 557, *et seq.*

Coffin, of New Bedford, and *Bassett*, of Taunton, for the plaintiff.

Stanton, of Boston, and *Elliot*, of New Bedford, for the defendants.

Hubbard, J. charged the jury, on the point of publication by the printers, that, if they printed the paper and handed it to the editor and publisher in the regular course of business, knowing that he intended to publish it, — or if they permitted him to take it, with a like knowledge, — and then, if he afterwards did publish it, this was a publication by the printers. As to the construction of the dream, he charged the jury, that they were to apply the same rules of interpretation to it, sitting as jurors, which they would if reading it at their own firesides; that they should look at it as a

whole, and not put such a construction upon it as to make it self-contradictory, unless the plain and obvious meaning of the writer compelled them to do so; that, in regard to the paragraph concerning the man who fell down dead, &c., it was for the jury to say what was the meaning of the writer, in view of the general scope and character of the whole article; that the plaintiff was bound to satisfy the jury that the meaning set forth in his innuendoes was substantially the real meaning, and, if they should find that this paragraph meant something essentially different from that stated in the innuendoes, the plaintiff must, so far as this passage was concerned, fail in his action, even though the paragraph, properly construed, was libellous, and the defendants had failed to prove it to be true; and that, when the jury had arrived at the fair meaning of the whole article, it was their duty to inquire whether the defendants had proved it to be true, so far as it was fairly set out in the plaintiff's declaration.

He also charged the jury to inquire, 1. Whether, at the time of the publication, the plaintiff was pursuing an illegal vocation, by trafficking in spirituous liquors without being duly licensed, or by keeping a tippling-house and dram-shop. 2. Whether the publication was of him solely in regard to his employment in such vocation. 3. And, if they found these issues in the affirmative, then the plaintiff had failed to maintain his action, and they must render a verdict for the defendants. The doctrine, that a party who was engaged in an illegal vocation could not recover, in an action for a libel upon him in that vocation, was fully sustained by the authorities cited, as well as on principle. It would outrage all our notions of justice, to permit a man, who pursued a business in open violation of law, to come to that same law for aid in obtaining damages for what was said or written of him solely in respect to his agency in such a business. And, in regard to such a plaintiff, the courts would not inquire whether the libel was true, or was published from good or bad motives. They would not interfere to aid either one of such parties. If, on the other hand, the defendants, in their publication, travelled out of the line of the plaintiff's business, to attack him in any other respect, or to charge him with any offence not within the scope of that business, then they would be so far liable in an action for damages. But, while this was true in civil actions for damages, the same rules would not apply in criminal prosecutions for libel. In that case, the commonwealth was supposed to have sustained an injury, and its rights were to be regarded; and the illegality of the complainant's vocation would not of itself constitute a defence, though that fact, in case of conviction, might go in mitigation of punishment.

To the ruling of the court on this and several of the other points above stated, the counsel for the plaintiff excepted. After a consultation of about an hour, the jury found a verdict for all the defendants.[1]

Court of Common Pleas, Massachusetts, December Term, 1845, at Worcester.

ISHI SPENCER *v.* SETH BEMIS ET AL.

Where a promissory note has been mutilated of its signature, if the facts shown explain the mutilation, it is not necessary, in Massachusetts, that the party suing on it should first apply to a court of equity for a complete instrument.

A negotiable note payable to order, is transferable by delivery merely, so that the party receiving it may be authorized to demand payment of it and deliver it up to the maker, though it is unindorsed.

Possession of a negotiable note is *primâ facie* evidence of title and ownership in the holder. Therefore, where the makers of a note, payable to order, took it up in good faith from a party presenting it for payment, the note bearing on it an indorsement alleged to be forged, it was *held*, on the question of rightful payment by the makers, that the party presenting it was to be presumed to have authority to receive payment for it and deliver it up: and that proof of forgery of the indorsement would not be conclusive against his right to bind the payee by his acts.

If a negotiable promissory note be stolen or lost, and paid by the makers in good faith on a forged indorsement, *it seems* that a delay of eighteen months and upwards by the payee to notify the makers of his loss, (it not being shown when he first discovered it,) is not such absolute evidence of negligence on his part, as to prevent his recovering the value of the note from the makers.

To prove forgery of a party's hand-writing, other specimens of it, though not belonging to the case, or admitted to be genuine, may be introduced in evidence on collateral proof of their genuineness.

THIS was an action of assumpsit, in which the plaintiff declared on a promissory note for $81 97 made by the defendants to him, dated March 25th, 1842, and payable on demand with interest. It appeared that the plaintiff having been in the employment of the defendants, copartners and manufacturers at Watertown, under the firm of Seth Bemis & Son, left their service and took up his

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[1] This novel case excited considerable interest in Bristol county. Some twenty-five or thirty witnesses were examined, and the trial lasted four days. The arguments of counsel, and the charge of the learned judge, were very full, occupying about ten hours in their delivery.

wages. These amounted to $81 97, which they were ready and desirous to pay in money, but for which, at the plaintiff's especial request, who alleged the greater security of this mode of keeping his earnings or other motive, they gave him the note declared on. Some three months after the plaintiff had left Watertown and gone elsewhere to reside, a person by the name of Walter G. Clapp, called upon the defendants with the note in question, and demanded payment of it, assuming to be the owner, and showing the note with an indorsement on it from Spencer to himself. The elder Mr. Bemis, to whom he presented the note, made no particular examination of the indorsement, but having often seen Clapp in Spencer's company, and recognizing his own signature, paid the note without hesitation. This was in June, 1842. In January or February, 1844, Spencer called on the defendants, and informed them that he had either lost the note or had it stolen from him by Clapp; and after learning that it had been paid, requested the use of the note for the purpose of making a criminal complaint against Clapp, either for larceny, or for the forgery of the indorsement. The defendants having made search for the note, found it and delivered it to Spencer with their signatures torn off, who thereupon proceeded to make a complaint before a justice of the peace in Worcester, against Clapp for stealing the note, and obtained a warrant for his arrest. The elder Mr. Bemis being summoned as a witness at the examination, testified to the foregoing facts; and on the strength of Spencer's oath, coupled with the fact of receipt of payment of the note, the magistrate held Clapp to answer further. But before the time of the postponed hearing, Clapp absconded, and had not shown himself down to the time of trial. Spencer then went before the grand jury, and having procured an indictment there against Clapp, (for larceny as before,) next commenced suit against the defendants, upon the note, of which he retained possession, alleging that the indorsement was a forgery and that they had paid it in their own wrong.

In order to prove his case, the plaintiff called first, the justice of the peace; and having shown the admissions of one of the defendants, identified and put in the note as the instrument declared upon. This was objected to, on the ground that it was no longer a promissory note, and that before it could be sued on, the plaintiff must call upon the defendants in equity, and obtain a perfect instrument. The point was rather made than pressed, and upon the authority of analogous English cases in the instance of lost notes. The court overruled it, but saved it for the defendant's benefit.

The plaintiff's counsel, in his opening address, made no point

that the note was paid by the defendants, *mala fide*, or without due caution, but stated that he should prove the indorsement to be a forgery, and then, that, as a matter of law, the defendants must bear the loss of having paid it to a wrongful holder. In order to prove the forgery, he put in evidence, among other testimony, specimens of the plaintiff's hand-writing, not belonging to the case, but of whose genuineness he proposed to offer proof. This was objected to, as going beyond the liberal rule laid down in *Moody* v. *Rowell*, (17 Pick. 490), and as altogether beyond the established practice elsewhere. The court admitted the evidence; rather, it remarked, as matter of general usage in this state, than as known to be definitely settled, on principle.

The defendants' counsel contended, that evidence proving the indorsement not to be in the plaintiff's hand-writing, fell short of the proof and effect of its being a forgery. That as the presumption of law is, that every person in possession of a note, is the rightful holder of it, this presumption not only attached to its being found in the hands of the defendants, but in the hands of Clapp; and though the indorsement was not Spencer's, the law would presume that it was rightfully made by some other person, and that Clapp came honestly by it. That, in this point of view, the burden of proof was on the plaintiff to show who did make the indorsement, if Spencer did not, and that if Clapp made it, he made it unauthorizedly, or with a criminal intent. The defendants' counsel contended further, that even if the indorsement were forged, yet if Clapp had had the note delivered to him by Spencer to collect, the defendants had a right to take it up and pay it, without any regard to the indorsement. That, as a promissory negotiable note, though payable to order and unindorsed, is yet assignable by mere delivery only, (*Jones* v. *Witter*, 13 Mass. 304; *Grover* v. *Grover*, 24 Pick. 261,) if Spencer had given it to Clapp to collect, or to use for the purpose of raising money, or as a gift, Clapp would thereby acquire a right which he might pass to the defendants without respect to the indorsement; and a payment by them would be a protection, though Clapp should have put the indorsement there himself. The defendants' counsel contended still farther, that proof of the note being lost or stolen, and of Clapp's having forged the indorsement, would not be sufficient to entitle the plaintiff to recover, without accounting for his negligence in omitting to inform the defendants sooner of his loss, so that they might have pursued their remedy against Clapp, which had now turned out to be worthless. That, as a matter of law, the plaintiff had been guilty of such negligence in the premises, (supposing everything proved which he contend-

ed for,) that he could not now recover of the defendants after a lapse of more than eighteen months since their payment of the note.

Upon this latter point, the court for the purposes of the trial, ruled against the defendants, saving the question.

The proof of a forgery, as attempted to be shown on the plaintiff's part, was not very direct or conclusive; and Mrs. Clapp, the wife of the absconding indorser, being called on the part of the defendants, testified that the plaintiff had been in the habit of loaning her husband money and notes, and that he had admitted to her, after the criminal complaint had been commenced against her husband, that he let Clapp have the note in question, and that there would not have been any trouble about it if Clapp had settled up. She further testified that her husband charged Spencer, in her presence, with having indorsed the note himself, and that he did not deny it; but only said, "well then, you might have settled up as you agreed to." She further testified, that while she had been in the court-house attending the trial, Spencer had come up to her, and after abruptly asserting that she did not know his hand-writing, and so could not testify that the indorsement was his, had said in answer to her question — "who, then, did write the notes and papers of yours, that I used to see you have?" "*I used to get Mr. Clapp to do all my writing.*"

Francis H. Dewey, for the plaintiff.

George Bemis, for the defendants.

MERRICK, J. charged the jury that the plaintiff having shown that the note was given to him and paid to another, the burden of proof was on the defendants to show that they had paid it rightfully to the third party; that, *prima-facie*, they were authorized to pay it to Clapp, as he was in possession of it; that if he came by that possession rightfully, whether by gift, sale, or delivery for the purpose of collection, though the note were payable to order and unindorsed, the defendants would be protected in making payment to him; that if the indorsement were forged, it would be merely evidence tending to prove that he came wrongfully by it, and not conclusive of the plaintiff's right to recover. The effect of such proof, however, would be to rebut the presumption of rightful ownership in Clapp, and throw the burden of establishing it on the defendants. If the evidence fell short of satisfying the jury of the forgery, then the plaintiff had failed in his case altogether.

The jury found for the defendants.

Ontario Common Pleas, New York, November, 1845.

CASE & SMITH, ads. LANSING.

If an officer who has not jurisdiction, issues a warrant under which a party is arrested or imprisoned, all persons who are instrumental in procuring it to be issued are trespassers, and liable to an action for false imprisonment.

The question of an arrest by submission to the authority of the officer is a mixed question of law and fact.

To constitute an arrest, the officer must have the person of the party within his power, with the means of coercion at hand, with the intent to make the arrest, and if needs be to exert a controlling force over him, and then there must be — 1st, either a manual touch of the person of the party; or 2d, he must, while the person of the party is in his power, actually put the party under restraint, either by depriving him of freedom of action, such for instance as shutting him up in a room, or placing him under the charge of another, or directing his actions by an authoritative, imperative mandate, and enforcing obedience thereto; or 3d, the party when within the power of the officer, with the means of coercion at hand, under a reasonable apprehension that force or coercion will be applied, submitting to the authority of the officer, and actually doing some act indicative of such submission.

The cases relative to an arrest by submission to the authority of the officer reviewed and explained.

THIS is an action for false imprisonment, tried in this court, at the May term, 1844. The defendants now move, on a bill of exception, for a new trial. On the former trial of this cause, the plaintiffs proved, by Godfrey J. Grosvenor, that he was a supreme court commissioner residing at Geneva. That on the 10th day of April, 1843, the defendant, Smith, accompanied by Case, made an application to him, as such commissioner, for a warrant against the plaintiff under the non-imprisonment act, upon the affidavit of the defendant, Case. The plaintiff was never before him, nor was the warrant ever returned to him. The affidavit, upon which the warrant issued, showed a debt of $77 66, due from the plaintiff to the defendant, Case, upon a judgment recovered in this court, and that the plaintiff had choses in action, which he refused to apply in payment thereof. The constable, to whom the warrant was delivered for execution, proved substantially the following state of facts, touching the arrest under the warrant: — That he called upon the plaintiff at his residence in Vienna, and showed him the warrant delivered to him, and a copy of the affidavit upon which it was issued; that the plaintiff, upon that occasion, said that he was unwell and not able to proceed to Geneva, but would attend any other day. The officer then left him. The next day he again called upon the

plaintiff and told him if possible he would like to have him go down that day to Geneva; that he thought if he could go it would better suit all parties. He declined, and he let the matter rest. He called again the next day; the plaintiff told him he had some business to attend to, and it was put off until the next day. The next day he again called, and was told by the plaintiff that he had not yet completed his business; that in its execution he must go to Canandaigua that morning, and would return that day and come to Geneva. The officer then went to Geneva, and the plaintiff came there; when the officer saw him in the street and told him they had been waiting for him, to which he replied that he had discovered that Mr. Grosvenor had no right to call him before him, and that he should not go; advised him that if he wanted to keep out of difficulty not to insist upon his going; that he objected to going, and that he had not better burn his fingers; that he had met him according to the agreement, but refused to go with him before the officer. Smith and the officer then went to Judge Whiting's office, and satisfied themselves that the supreme court commissioner had no right to issue the warrant. Smith then directed him to do nothing further. At the last interview between the plaintiff and the officer at Vienna, one Hildreth was present and desired the matter to be put off, and said that if the officer would put it off until the next day the plaintiff should be at Geneva, and the plaintiff requested Hildreth to go to Geneva to become his bail, if necessary, and that Hildreth went accordingly. This was substantially all the evidence touching the arrest.

The counsel for the defendant moved for a nonsuit upon the ground that the proofs did not show that the plaintiff ever was arrested under and by virtue of the warrant, or that he was ever in the custody of the officer, or that he ever submitted to his authority, nor did it appear that he was ever deprived of his liberty. That the proof showed that he did not go to Geneva with the intent of submitting himself to the custody of the constable, but that when he first saw him there he refused to submit to arrest, and declared that he should not go before the commissioner. The court refused the motion for a nonsuit on the ground that there had been a technical arrest. That as the officer who issued the warrant had no jurisdiction, the defendants were liable in this action by reason of what took place between the officer and the plaintiff. That the cause of action had been made out by the proof. The defendants' counsel excepted to this decision. The court charged the jury upon the proof in the cause, the plaintiff had sustained his action, and the defendants were liable for falsely arresting and imprisoning the

plaintiff. The jury, under this charge of the court, rendered a verdict in favor of the plaintiff for $90 damages and 6 cents costs.

G. R. Parburt, for the plaintiff,
A. Worden, for the defendant.

SMITH, First Judge. The point which is raised under this bill of exceptions is, that the court improperly refused the motion for a nonsuit, and held, as a matter of law, that the plaintiff was entitled to recover. It is conceded that the officer who issued the warrant had not jurisdiction. That being conceded, the decision of this point involves the question, whether there was in point of law an arrest of the defendant under the warrant, for if there was, as the officer who issued it had no jurisdiction, the defendants who procured it to be issued were trespassers and liable to the plaintiffs in this action. 5 Mason R. 502; Cro. Car. 394; 2 Will. 382; 1 H. Blk. R. 68; 4 T. R. 2; 4 Taunt. 635; 2 T. R. 372; 8 Mass. R. 79; 10 Mass. R. 105; 5 Mass. R. 547; 6 Pick. R. 399; 5 Pick. R. 498; 1 Caines, R. 92; 13 J. R. 444; 15 J. R. 152; 3 Cranch, 331.

The question of arrest is a mixed question of law and fact. It is a question of law for the court to decide as to what facts will constitute an arrest, and a question of fact for the jury to find whether such a state of facts does exist as is necessary to make out a legal arrest under the law of the case, as settled by the court.

What, then, in contemplation of law, is an arrest? It is defined to be the restraint of one's person by process. To constitute an arrest the officer must exercise a controlling authority over the defendant and have the process in his hand to enforce. Formerly it was the practice to make an arrest by an actual seizure, or a laying of the hands on the person; but the law is now settled that no manual touching of the body, or actual force, is necessary to constitute an arrest. It is sufficient if the party be within the power of the officer and submits to the arrest. If the officer exercises a controlling authority and have the process in his hands to enforce it, a submission under such circumstances, without a manual caption, is sufficient.

Mr. Justice Baldwin, in *Johnson* v. *Tompkins*, (1 Baldw. C. C. R. 601,) lays down the rule thus: "It is not necessary, to constitute false imprisonment, that the person restrained of his liberty should be touched or actually arrested. If he is ordered to do, or not to do a thing, to move or not to move, against his own free will; if he is not left to his own option to go, or stay, where he pleases,

and force is offered, or threatened, and the means of coercion are at hand ready to be used, or there is reasonable grounds to apprehend that coercive measures will be used if he does not yield, a person so threatened need not wait for an actual application. His submission to the threatened and reasonably-to-be-apprehended force, is no consent to the arrest, or detention, or restraint of the freedom of his motion. He is as much imprisoned as if his person were touched or force actually used. The imprisonment continues until he is left to his own will to go where he pleases, and must be considered as involuntary till all effectual coercion or restraint ceases, and the means of effecting it are removed."

In the case of the *United States* v. *Benner*, (1 Baldw. C. C. R. 239,) he again says: "An arrest is the taking, seizing, or detaining the person of another, touching or putting hands upon him in the execution of process, or any act indicating an intent to arrest. Imprisonment is the detention of another against his will, depriving him of the power of locomotion."

Mr. Stevens, in his treatise on the law of Nisi Prius, says: "In all the cases it seems that the plaintiff must, by the act or order of the defendant, be deprived of his personal freedom for some portion of time, however short. Bare words, without laying hold of the plaintiff's person, or restraint on submission, without force, will not constitute an arrest. Although mere words will not constitute an arrest, yet, in ordinary practice, words are sufficient to constitute an arrest if they impose a restraint upon the person, and the party is accordingly restrained, for he is not obliged to run the risk of personal violence and insult by resisting until actual violence is used." Stev. N. P. 2018; 3 Stark. Ev. 3d ed. 1113; 1 Car. & Payne, 152.

The difficulty which arises in most cases of this nature is, the determination of the question as to what constitutes a submission within these rules. This difficulty can best be solved, and the principles of the rule illustrated, by a critical examination of the cases where the question as to what constitutes an arrest, has been considered by judicial tribunals. As we have been unable to find any elementary writer on this subject, who has collected and classified the authorities bearing upon this question, or deduced from them the precise point as to what constitutes a submission, we shall refer to the cases more fully than we otherwise should, to the end that our precise views of the case at bar may be better understood. In the first place we refer to the cases where it has been settled that restraint on submission without force, will not constitute an arrest.

In *Arrowsmith* v. *Mesureir*, (2 N. R. 211,) the constable went to

the plaintiff with a warrant to arrest him on a charge of conspiracy, and exhibited the warrant, and the plaintiff took a copy of the same, and afterwards he accompanied the officer to the magistrate, yet it was held that the warrant had only been used as a summons, and that there was no arrest. Lord Mansfield said — "I suppose an arrest may take place without any actual touch, as if a man be locked up in a room; but here the plaintiff went voluntarily before the magistrate. The constable brought a warrant, but did not arrest him. How can a man, walking freely to the magistrate, prove himself to be arrested?"

In *Berry* v. *Adamson*, (6 Barn. & Cress. R. 534,) the officer to whom the warrant was delivered, sent a man to the plaintiff with a message that he had a writ against him, and requested that he would fix a time for attending at the officer's house, and give bail. He did attend, and gave bail accordingly. It was held, as the officer's man did not take the warrant with him, nor tell the plaintiff that he came to arrest him, but merely gave notice of the writ, this was no arrest.

In *George* v. *Radford*, (3 Car. & Payne, 464,) a sheriff's officer having a warrant from the sheriff to arrest a party for debt, went to him and read the warrant, and said, "I know you; I will take your word, but you must give bail." He then went to the defendant's attorney and told him what had occurred, and said, "that bail must be put in," and made a return that he had arrested him. It was held that this was not an arrest, but that if the party had gone with him it would have been sufficient.

Arrowsmith v. *Mesureir* seems based upon the ground that the officer did not exercise any control or authority over the party, and that his going with the officer subsequently was of his own volition, the act a free and voluntary one. *Berry* v. *Adamson*, rests upon the reason that no authority or control was exercised by the officer over the action of the defendant when within his power. Although in *George* v. *Radford* there was the exercise of positive authority in the direction that the party "*must give bail*," yet there was a manifest intent, not to put the party under restraint, and there was no act by the party, when within the power of the officer, indicative of submission, as there would have been had the party gone with the officer.

The next class of cases to which we advert, are those which show that mere words, unaccompanied by any act of submission, will not constitute an arrest. In Dalton's Justice, C. 170, it is said, "If a constable or other officer upon a warrant received from a justice of the peace, shall come unto a party, and *require* or *command*

him to come, or go before a justice, that is no arrest or imprisonment. The editor of the edition of 1742, in a note says: "A bailiff or sheriff says to a man being present, '*I arrest you*,' although he touch him not, this is a good arrest, and if the party go away it is a rescue." But this doctrine is contradicted in the case of *Jenner* v. *Sparks*, 1 Salk. R. 79. In that case the bailiff, having a warrant against Sparks, went to him in a yard, and being at some distance, told him he had a warrant, and said he arrested him. Sparks kept him off with a fork, and retreated unto his house. It was held that this was no arrest; that bare words will not make an arrest; but if the bailiff had touched him, that would have been an arrest.

In *Russen* v. *Lucas*, (1 Car. & Payne R. 133,) the officer having a warrant for one Hamer, went to a tavern where he was sitting, and said, "*Mr. Hamer, I want you.*" Hamer replied, "*Wait for me outside the door and I will come to you.*" The officer went to wait, and Hamer went out of another door and got away. Abbot, Ch. J. says, "mere words will not constitute an arrest, and if the officer says '*I arrest you*,' and the party run away, it is no escape; but if the party acquiesces in the arrest and goes with the officer, it will be a good arrest. If Hamer had gone with the officer into the passage, the arrest would have been complete." There is no doubt the rule is well settled, that if the officer exercise a controlling authority over the person of the party, while within his power, and imperatively direct that he must go with him, or that he must do, or that he must not do a particular act, and obedience is yielded, or the party being in the power of the officer does go, or does any other act against his will, in order to prevent actual force being used, this will amount to an arrest and imprisonment.

In *Hermer* v. *Battyn*, cited in Buller's N. P. 62, it is said, "If the bailiff, who has the process against one, says to him, when he is on a horse or in a coach, 'You are my prisoner; I have a warrant against you,' upon which he submits, turns back, or goes with him, though the bailiff never touched him, yet it is an arrest because he submitted to the process; but if, instead of going with the bailiff, he had gone or fled from him, it could be no arrest, unless the bailiff had hold of him."

In *Gold* v. *Bissell*, (1 Wend. R. 210,) the constable who had the warrant called on Bissell, informed him of the process he had against him, and Bissell thereupon went with him some distance, and then procured a person to engage that he would appear the next day before the justice, and he did appear accordingly. It was held that as the party was in the power of the officer, and while

thus in his power, submitted to his authority and went with him, this amounted to an arrest.

In *Pocock* v. *Moore*, (Ryan & Moody, 321,) the defendant had sent for a constable, and directed him to take the plaintiff, on a charge of felony. The constable said, "you must go with me." On which the plaintiff said he was ready to go, and actually went with the constable towards the police office, without being seized or touched by the constable. Abbot, Ch. J. said, "I am of the opinion, that if a person send for a constable and give another in charge for felony, and the constable tell the party he must go with him, on which the other, in order to prevent the necessity of actual force being used, express his readiness to go, and does actually go, this is an imprisonment, and gives the party thus consenting to go, an action of false imprisonment."

In *Grainer* v. *Hill*, (4 Bing. N. C. 212,) the sheriff's officer came with a capias to the plaintiff when ill in bed, and told him that unless he delivered up the register of a vessel, or found bail, he must either take him, or leave a man with him, insisting that the plaintiff should either deliver up the register or find bail, but did not touch his person. The plaintiff delivered up the register. It was held, that as the plaintiff was in a situation in which bail was to be procured, there was a sufficient restraint upon the plaintiff's person, to amount to an arrest, as the plaintiff resigned his personal liberty under the authority of the writ, by delivering up the register.

The principle fairly deducible from all the cases is, that to constitute an arrest, the officer must have the person of the party within his power, with the means of coercion at hand, with the intent to make the arrest, and if needs be, to exert a controlling force over him and to direct his actions; and then there must always be, — 1st, either a manual touch of the person of the party, which will amount to an arrest, though the party arrested does not yield to his authority, or actually escapes out of his hands; or 2d, he must, while the party is in his power, and the means of coercion at hand, actually put the party under restraint, either by depriving him of freedom of action, such for instance as shutting him up in a room, or placing him under the charge of another, or directing his actions by an authoritative imperative mandate, and enforcing obedience thereto; or 3d, by the party, when within the power of the officer, with the means of coercion at hand, under a reasonable apprehension that force, or coercion will be applied, submitting to the authority of the officer, and actually doing some act indicative of such submission.

To constitute an arrest by submission, it is necessary that the party,

when actually within the power of the officer with the means of coercion at hand, under a reasonable apprehension of force or coercion, as a concurrent act, do something against his will, which is indicative of an intent to, and that he does in fact yield up his personal freedom of action, for a time at least, to the direction and control of the officer. For as submission is *an act*, unless there is some *act done* indicative of such a subjection to the authority and control of the officer, it would be impossible to say that the party had been put under restraint, or that he had in fact yielded up his personal freedom of action so as to constitute an arrest.

We have not been able to find any case where the action of the party, when within the power of the officer, has been left entirely at his own option; when the officer has given no direction in reference to the conduct of the party, or where the party when thus in his power did not do some act indicative of submission, such for instance as going with the officer, or surrendering up something in pursuance of his requisition, in which it has been held to constitute an arrest by submission.

In the case of *Russen* v. *Lucas*, above cited, great stress is laid upon the fact that Hamer did not accompany the officer under the warrant, but promised to come to him at the door. That without this there was the absence of the evidence of an intent to submit, but that if he had accompanied him into the hall even, that would have been indicative of an intent, and would have in fact been *an act* of submission, which would have constituted an arrest. In the case cited from Buller's N. P., the fact of submission was evidenced by the fact, that the party, while within the power of the officer, turned back, and went with the officer. So too in *Gold* v. *Bissel*, the party did actually accompany the officer a short distance, and was then suffered to go, upon his procuring another to undertake for his appearance the next day; and in *Pocock* v. *Moore*, the officer not only told the party that he must go, to which he assented, but he did actually go towards the police office, and stress is laid upon the fact that he did go with the officer to prevent force being used. In *Grainer* v. *Hill*, the fact of submission was also evidenced by an actual surrender up of the register of the vessel when in the power of the officer, and in obedience to his requirement, to prevent the use of force or the necessity of giving bail. Thus it will be perceived, that in each of these cases, which are the only ones which have come under our observation on this point, the fact of submission to the authority of the officer was evidenced by *an act done* while within the power of the officer, which was unequivocally indicative of the fact, that the party did yield up his freedom

of action for a time, and that he did in fact consider himself under restraint by virtue of the process.

If we apply the rule fairly deducible from the principle of the above cases, to the case at bar, in our opinion there was no arrest at Vienna, for the officer did not touch the person of the plaintiff, nor did he declare to him that he arrested him under the warrant, nor did he exercise any control or authority over him by giving him any imperative directions as to what he must or must not do. He left him to act freely and voluntarily, and there was no act done in evidence of actual submission.

The plaintiff, after he parted from the officer at Vienna, during his journey to Canandaigua, or from thence to Geneva, cannot properly be considered as under an arrest, for he was not within the power of the officer, and there was the entire absence either of coercion or the means to enforce it. The act of going to Geneva must be regarded as optional with the plaintiff, as it was done without constraint, and was entirely voluntary. True, he had agreed to go, yet that agreement, although it might and perhaps did operate as a moral restraint upon the conduct of the party, still was not any physical restraint, operative upon the personal freedom of the party. He could not then be considered as under imprisonment.

It may be well doubted whether there can be any such thing as an arrest by submission in the absence of the officer or some one acting under his authority and direction, for *power in the officer, with the means of coercion, must exist and combine with the act of submission by the party arrested.*

It is true, that when an arrest is made by an actual manual touch, or by a coercive power or control, that the officer who has the warrant need not be the hand that arrests, nor in the presence of the person arrested, nor within sight, nor within any exact distance; it is enough if the person making the arrest, is acting in aid of the officer, and under his authority and direction, provided they are both pursuing the same object. (Cowp. R. 63; 13 Mass. R. 322.) Yet when the arrest is to be made out by an act of submission, it seems difficult to conceive of such an act without the actual presence of some person to whom such submission can be made. As submission is *an act*, the presence of the party to whom it is to be made, seems as indispensable a prerequisite, as that of the party who is to submit; hence if there was no act of submission at Vienna, there could not have been any between that, and the time of the arrival of the plaintiff at Geneva. There certainly cannot be such a thing as submission without the assent of the mind, and the concurrence of the will of the party in the authority of the officer.

We think the act of going to Geneva, with a settled determination when there to refuse to go before the magistrate, was indicative of an intent to resist, rather than of an intent to yield to the authority of the officer. What was said and done by the plaintiff the moment he came within the power of the officer at Geneva, is very strong presumptive evidence, that he did not consider himself under arrest. He seems to have gone there only for the purpose to tell the officer that he would not fulfil his agreement to submit, and to advise him, that he would not go with him before the magistrate, and that he had not better compel him to do so. How can we regard his act of going there with such an intent at heart, followed as it was by a positive refusal to submit, as any evidence of an acquiescence in the authority of the officer?

The most that can be claimed for what took place at Vienna, is, the plaintiff declined, or excused submission at that time. The whole tenor of the conversation was in reference to a future submission. The whole negotiation was based upon the ground of the inconvenience of a present submission, and it resulted in an agreement to submit at a future time. This agreement was never performed. The plaintiff at Geneva, expressly refused to perform, and in fact set the officer at defiance. We cannot substitute an agreement to do an act, for the act itself in such a case as this. Had the plaintiff, either at Vienna or at Geneva, gone with the officer for any distance, however short, that would have been an act of submission; it would have been evidence of imprisonment. We attach no importance to the circumstance, that Hildreth said that if it could be put off that the plaintiff should be at Geneva, as the officer imposed no such condition upon the plaintiff, nor did he demand that he should go to Geneva at that time; nor did he leave the plaintiff in the custody of Hildreth, in pursuance of this undertaking; he in fact remained passive in his acquiescence in the wishes and will of the plaintiff. However much I regret to differ from my learned predecessors who presided at the former trial, I am constrained, after a critical examination of the authorities, to arrive at the conclusion, that as there was no manual taking, nor any actual coercion or restraint used on the part of the officer, there was not any such distinct act of submission when within the power of the officer as afforded conclusive evidence, that there was any restraint upon the plaintiff's person, or any such abridgment of his freedom as would authorize the court to declare, as a matter of law, that there was an arrest and imprisonment. The court, instead of declaring as a matter of law, that the plaintiff was entitled to recover, should have submitted the case to the jury under a charge, that it was for them to find, as a

question of fact, whether the plaintiff did, when within the power of the officer, submit to the authority of the officer, and that if, from the evidence in the case, they were satisfied of the fact of submission, then the plaintiff would be entitled to recover; that the fact of submission must be evidenced by some act indicative of that fact, or they must be satisfied that the plaintiff did yield to the authority of the officer. This case is certainly one not entirely free from difficulty, and it is with much distrust of the accuracy of my conclusions, that I go for the reversal of the ruling of my learned predecessor, whose opinion is entitled to great weight. New trial granted — costs to abide the event.

Supreme Judicial Court, Massachusetts, January, 1846, at Boston.

Ex parte James Baker.

The statute of Massachusetts, of March 16, 1844, so far repeals the insolvent act of 1838, as that the first meeting of the creditors may be held more than thirty days after the issuing of the warrant. Whether such meeting may be held within less than ten days — *Quere.*

A creditor presented a claim at the first meeting of the creditors of an insolvent, and it appeared that he had received an absolute deed of land from the insolvent in part payment of, or as security for, his debt. He executed before the master in chancery a release of the land so conveyed, to the "assignee hereafter to be chosen," and was then allowed to prove his whole claim, and to vote for an assignee. *Held*, that the proceeding was irregular; that the assignee was not duly elected, and that the assignment must be declared void.

This was the case of a petition by James Baker, for a mandamus on Bradford Sumner, Esq., a master in chancery within and for the county of Suffolk, and on F. W. Choate, Esq. It appeared that one Luke Moore, on June 2, 1845, presented to Mr. Sumner a petition to take the benefit of the insolvent act of Massachusetts, and a warrant was issued on the same day, in which the first meeting of creditors was called on the second Monday of July then next, being the 14th of that month. At the said meeting, one Samuel Moore, a brother of the insolvent, presented a note of hand for proof, larger in amount than all the rest of the claims together. This was objected to as fictitious, and upon examination it appeared that the insolvent had, within three months, made an absolute deed to Samuel Moore of a lot of land, in part payment of, or security for, this debt. The other creditors contended, that if the claim of

Samuel Moore was a valid one, still he ought not to be permitted to vote for an assignee, whether the conveyance was to be regarded as a mortgage or as an absolute conveyance in part payment of the debt. If the latter, then its value must be ascertained and deducted from the claim; if the former, then it must be disposed of according to the Act of 1838, § 3, which plainly implied that an assignee should be first chosen. The master decided that the claim of Moore was valid; that the conveyance was in the nature of a mortgage, and that Moore could execute a release of all his interest in the land, and then prove the whole amount of his claim and vote for an assignee. Samuel Moore then executed a release in the following terms: — "Know all men by these presents, that I, Samuel Moore, of Charlestown, in the county of Middlesex, tanner, do hereby release to the assignee or assignees hereafter to be chosen, of Luke Moore, of Chelsea, in the county of Suffolk, an applicant for the benefit of the insolvent law of Massachusetts, before Bradford Sumner, Esq., a master in chancery for the county of Suffolk, all right or title I may have acquired to any real estate, situated in said Chelsea, and conveyed to me by deed from Luke Moore, dated 10th April, 1845, and I hereby covenant, promise, and agree that I will never claim any right, title, or interest whatever in and to the said estate," &c. The vote was then taken, and it appeared that there were for F. W. Choate, Esq. three votes, namely; Samuel Moore for $1314, William Munroe for $20, F. W. Choate for $5, amounting in all to $1339. The votes for John P. Baker were six, namely; Stephen Cummings for $375 38, Winnissimet Company for $69 28, James Baker for $150, Eben B. Phillips for $112 92, Edward Bassett for $17, S. Forestall for $13 75, amounting in all to $738 33. The master then declared F. W. Choate, Esq. legally chosen assignee, and made out an assignment to him accordingly. James Baker now petitioned for a process to revise the proceedings on the ground of irregularity upon the facts, among others, as above set forth.

P. W. Chandler, for the petitioner.

B. Sumner, and *F. W. Choate*, for themselves.

Shaw, C. J. after consulting with the other members of the court, delivered an opinion. In regard to the first point, whether the proceeding of the master was void because the warrant directed the first meeting to be on the second Monday of July, being more than thirty days from the issuing of the warrant, — the statute of 1844, c. 178, requires the master to hold a court on the second Monday

of every month, for the proof of debts, &c. in cases pending before him, and "said proceedings shall be transacted only in said court, and after due notice to all parties in interest." By the second section it is provided, that such courts shall be considered open at all times, for the reception of petitions, the issuing of warrants, the approval of compositions, bonds and sales, &c. The seventeenth section repeals all provisions inconsistent with the act. I am of opinion that, for the proof of debts, examination of insolvents, and choice of assignee, the statute is imperative, that they shall be done at a court held on the second Monday, and as these are all acts which must be done at the first meeting, such first meeting must be held on such second Monday. The proceeding is pending before the master from the time he issues his warrant. As the policy of the law, and the special exception of the second section require that a petition may be received, at any and all times, it may be so received; but if it is issued within ten days before any second Monday, it cannot be returnable more than ten days, and within thirty days, on any such second Monday. The provision, therefore, is inconsistent with the provision in the statute of 1838, which requires it to be so returned, and repeals it. Which, then, shall give way, if both cannot be complied with? Perhaps it may repeal the whole as an imperative provision. The new law requires due notice to be given. If the intervening time between the day of issuing the warrant, and the next ensuing second Monday, is too short to allow of due notice in the judgment of the master, then I think it is lawful to make the warrant returnable on the next succeeding second Monday. I am of opinion, therefore, that this proceeding was not illegal, because it was returnable on a day more distant than thirty days, being made returnable on the second Monday of July, 1845. Whether if the second Monday, coming within ten days, would afford time in the judgment of the master to give due notice, ordering the first meeting to be held on such second Monday within ten days would be legal or not, I give no opinion.

The next material and important question is, whether the proof of Samuel Moore's debt should have been admitted, and he allowed to vote as assignee upon that proof. The first objection is, that Samuel Moore received of the insolvent, a deed dated 10th April, 1845, within three months next preceding the petition, purporting to be absolute on the face, for which, as it appears, no consideration was paid at the time, but alleged by the insolvent and the creditor, to have been in satisfaction or security of the debt. If this was given by way of preference and so known to the creditor at the time, he would be barred of his right to prove his debt; but

I think this was a question of fact, within the jurisdiction of the master. But it appeared fully in the examination, and was so considered by the master, that the deed was given on account of this debt, either as payment *pro tanto* according to its value, to be ascertained in some manner not settled by the parties, or at the consideration expressed in the deed; or it was taken as a mortgage or pledge to secure the debt.

In the two first of these cases, the value of the land should be first ascertained and deducted, and the balance only, if any, allowed as the claim of the creditor. In the third case, the creditor should, in the first place, require the property to be sold and the proceeds applied to the payment of his debt, and then he might be admitted to prove for the balance. But this requires that it shall be done in such manner as the master shall order, and the creditor and the *assignee* shall respectively execute it. This plainly implies that it cannot be done, until an assignee is chosen, and therefore cannot enable such creditor to vote in the choice of assignee, because he cannot then have proved his debt. Or, he may release and deliver up to the assignees, the premises so held as security, &c. and thereupon be admitted to prove his whole debt. This also implies that the assignees are first to be chosen, and till such assignees are chosen, such creditor cannot prove, and therefore cannot be a creditor authorized to vote for assignee.

The release which was executed and filed, can be of no avail, for several reasons. (1.) Because it could not take effect at the time, there being no person named, and no person within the designation, there being no assignees chosen. (2.) Because there was no delivery, and no person to whom delivery could be made. (3.) But more especially for the reason already given, that as it implies that there are assignees who can act for the creditors in such alienation and transfer, it cannot be done conformably to the statute, until assignees are chosen.

It appears to me for these reasons that the admission of Samuel Moore, upon the execution of such a release to prove his debt and vote in the choice of an assignee, was irregular; that the assignee was not duly elected, and that his election and the assignment made under it were void, and must be so declared.

An order must be accordingly made on the master to call a new meeting for the choice of assignee.

District Court of the United States for the Southern District of New York, December, 1845.

UNITED STATES v. JACOB GATES.

One indicted, convicted and punished under the act of congress of August, 1842, § 19, for smuggling, is not liable to an action under the act of 1799, for landing the same goods (for smuggling which he has suffered,) without a permit; the two offences sought to be punished concurring in the same act of landing.

THE fifteenth section of the act of congress of March 2d, 1799, prohibits the landing, within the United States, of goods brought in any vessel from any foreign place, but between the rising and setting of the sun, except by special license from the collector, &c., and at all times, without a permit for said landing, under a penalty of $400 for each offence, to be recovered of the person in charge of the vessel at the time, and others aiding, &c. To an action, brought by the United States, for this penalty for landing certain goods from the packet ship Oxford, from Liverpool, (he being then in command of said ship,) the defendant pleaded, that since the landing alleged, he had been indicted, convicted and sentenced at the suit of the United States, in the circuit court of the United States, for smuggling, and clandestinely introducing into the said United States, the goods mentioned in the declaration, with a view to defraud the revenue of the United States, and that having paid the fine of two thousand dollars, and borne imprisonment for thirty days, pursuant to the sentence of said court, for the same act of landing, for which this action is brought to recover the above penalty, he is not liable in this action. To this plea the United States demurred, and the defendant joined in the demurrer.

Benjamin F. Butler, district attorney, with whom was F. A. Marbury, relied on the following points in support of the demurrer:

I. The facts set forth in the plea, and which are admitted by the demurrer, constitute no valid bar to the action of the plaintiffs. (1) The unlading and delivery of goods without a permit from the Collector (§ 50, act March 2, 1799,) is an offence entirely distinct from the fraudulent introduction of goods into the United States, (Act Aug. 30, 1842, § 19,) for which the defendant has been indicted and punished, as set forth in his plea. The former offence may be committed in respect to free goods, the latter only concerns such as are *dutiable*. A party might unlawfully unlade goods, and thus

incur the penalties of the law of 1799, without that *fraudulent intent* which would be necessary to a conviction, under the law of 1842. The punishment attending the violation of the former, differs from that prescribed in the latter. (2) The two statutes are at most only cumulative. The former is not repealed by the latter, neither being incompatible with the existence and operation of the other.

II. There is no *merger*. The ancient feudal doctrine of the merger of a private wrong in a felony, is not applicable to the civil polity of this country, and has never been adopted in our system of jurisprudence.

Phermer v. *Webb*, (Ware R. 76.) But if this doctrine were recognized by our courts, it could not affect this case, as the law of 1799 was devised for the protection of a *public* right, and the infringement of its provisions is therefore a *public* wrong. Nor is the violation of the law of 1842 made *felony;* it is on the contrary expressly declared to be a misdemeanor.

Charles A. Peabody, for the defendant. Though there are no cases in point, which I have been able to find, yet upon general principles, the defendant is not liable to this second action for another offence in the same act for which he has already been punished at the suit of the same party, the United States.

I. The statutes were intended by congress for different cases, the act of 1799 being intended to apply only to those cases in which the landing was only in violation of that statute, and without fraud or fraudulent intent upon the revenue of the United States, and furnishing the legitimate remedy for such a case; and the act of 1842 being violated, and furnishing the only legitimate remedy, when the fraud or fraudulent intent upon the revenue (as in this case) concurred with the actual landing, and made a part of the offence. They cannot be both of them enforced for the same landing of goods. It is admitted, that the one statute does not entirely repeal the other, and also that the doctrine of the merger of the civil in the criminal remedy, is no part of the common law of this country, that doctrine having had its origin in the necessity of the case in England, which never existed in this country. But neither position affects this case. The principle contended for, is more nearly analogous to the doctrine of merger of one offence in another, as in "robbery" is merged the "assault with intent to rob," and the "assault and battery," all three of which offences are literally committed in the first, (the robbery) and yet it will not be contended, that all the penal consequences of these three offences could be enforced for one robbery. Accomplished by the assaults mentioned,

the last two would be merged in the first, or the last in either of the first two, which might accompany it in the same act. So assault and battery are merged in murder.

II. On general principles there can be only one punishment for one act, one satisfaction for one debt. The United States having enforced their remedy, their claim for this act is satisfied, extinguished. The sentence of the law in favor of the plaintiffs has been fulfilled; the liability of the defendant is discharged, by his compliance with the former sentence of the court in their favor. This is the law in cases of civil claims, and in criminal law the maxim, "*Nemo debet bis*," &c. is familiar. The suits are both by the commonwealth; both offences are against the United States. The merger of the civil in the criminal remedy is not at all analogous, (even if it were law); there the individual claim concurs with the rights of the commonwealth. The two claimants, urge too, separate claims. Here the *same party* claims two remedies for the *same wrong*.

III. The intention of the legislature is to be regarded in determining this question. Did they intend both these penalties for one offence? Clearly not. The spirit and intent rather than the letter of the law is to be our guide. The two offences are different, although they concur in the same act of defendant. The legislature can no more be taken to intend to multiply penalties in this case, than in the case of robbery alluded to before.

On either of the above grounds, the plea is good, and the demurrer must be overruled, and judgment for defendant.

Betts, J., after alluding to the pleadings in the case, pronounced the following opinion in substance: By the act of August 30, 1842, sec. 19, it is enacted, "If any person shall, knowingly and willingly, with intent to defraud the revenue of the United States, smuggle or clandestinely introduce into the United States, any goods, wares and merchandise, subject to duty, by law, and which should not have been introduced, without paying or accounting for the duty, &c. &c., every such person shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be fined in any sum, not exceeding $5000, or imprisoned for any term of time, not exceeding two years, or both, at the discretion of the court." It is manifest, upon the comparison of this with the provision of the statute of 1799, that they are not inconsistent in any respect with each other, nor is the latter so far applicable to a like state of facts as to import an intention in the legislature to repeal or supersede the prior enactment, because the acts which are subject to the operation of

the respective statutes, are not identical in all particulars, and furthermore, because the forfeiture of the goods and vessel may still be inflicted, as provided in a subsequent clause of the same section, of the act of 1799, which inflicts the penalty for which this action is brought.

1st. The offence under the act of 1799 is committed, though the goods landed be not subject to duty, but not where a permit is granted, although there may be deception or smuggling under it, nor unless the goods are unladen from some vessel. 2d. The offence, under the act of 1842, may be committed notwithstanding a permit for landing, but not for clandestinely landing goods which are not dutiable. The offence is also complete, by bringing in clandestinely, by any other means than landing from vessels.

These instances, independent of others which may be designated, show that the 50th section of the act of 1799 may still be in force and operation in relation to many particulars, without being touched or interfered with by the provision of the 19th section of the act of 1843.

But when both apply to identically the same state of facts, can both be enforced, or does the latter supersede the former and supply the whole law applicable to such particular cases? In the case of the *United States* v. *One Case of Hair Pencils*, (1 Paine, 405–6,) Judge Thompson discusses the doctrine of the repeal of one statute by force of the enactment of a subsequent one, on the same subject-matter. "In most cases," he says, "the question resolves itself into the inquiry, what was the intention of the legislature? Did it mean to repeal or take away the former law, or was the new statute intended as merely cumulative?" (6 Davies's Ab. 594, § 9.) The courts, in examining the questions as they present themselves on this subject, have fixed upon various incidents as indicative of the legislative purpose, and rendered them, probably, legal presumptions, which are to be regarded as fixing the intent. (6 Dana, 591; 6 Bac. Ab. Statute D. M.; Dwarris on Statutes, 674, 675; 21 Pick. R. 373; 5 Mass. R. 380.) So Judge Thompson adverts to some criteria, decisive of the purpose of the legislature to introduce a new law, not cumulative to the former, but revoking and supplanting it. As when the latter acts on the same subject-matter, introduces some new qualifications or modifications, or is affirmative in its character, (1 Paine, 406,) though it is well settled that subsequent statutes, which add cumulative penalties merely, do not repeal former statutes. (1 Cow. 298, per Lord Mansfield.)

The act of 1799, § 50, prohibits the landing of goods, &c., under a penalty, and moreover, denominates it *an offence*. Ordinarily, mere statutory penalties, are to be sued for and recovered by ac-

tion of debt. (5 Dana, 243, 260); *Jacobs* v. *United States*, (1 Brock. R. 521.) But information will also lie when no method is prescribed by the statute for recovery of the penalty, *Adams* v. *Wood*, (2 Cranch, 336,) and it would seem that the party may, at the election of the government, in place of a suit, be indicted and fined to the amount of the penalty, (1 Chit. C. L. 162,) unless the special mode of remedy is pointed out by the statute. (Bac. Ab. Indict. E.); *Rex* v. *Samsbury*, (4 D. & E. 457); *Hollingsworth's case*, (Cro. Jac. 577.)

If the defendant in the case had been before indicted on the 50th section, and fined the amount of the penalty, and then this action for the penalty was instituted, it can scarcely be questioned that the plea sets up a complete bar to such proceeding, the averment of facts showing that the one case, in all its particulars, is involved in the other. It is laid down, by Baron Gilbert, that if the party hath once been fined in an action on the statute, such fine is, it seems, a good bar to an indictment, because by the fine the end of the statute is satisfied. (Bac. Ab., Stat. E.)

It appears thus to be clearly the law, when the proceedings are founded upon the same statutory penalty, that the government is restricted to a single exaction of the penalty, whether enforced by action or indictment. It is not perceived that any distinction in principle can be drawn between inflicting punishment for the same offence, by different modes of prosecution under an enactment, or by applying to the case enactments in separate statutes, all having relation to precisely the same subject-matter.

The principle upon which the plea *autre fois acquit* or *autre fois convict*, is founded, is that no man shall be placed in peril of legal penalties more than once upon the same accusation; (1 Chit. Cr. L. § 452, 462,) and this applies to misdemeanors as well as felonies, except that if the plea is found against the defendant in cases of felony, the judgment is *respondeat ouster*, but in case of misdemeanor, is final, (1 Chit. Cr. L. § 451, 461, 462.) The government will be restricted to one satisfaction for an offence, whether the punishment be pecuniary or corporeal, unless the legislature, in explicit and indubitable language, exact a further one.

It is true, the court do not favor constructive repeals of statutes, and look for some marked inconsistency between the two, before one is held revoked by implication by the other. (9 Cowen, 437; 5 Hill, 221; Dwarris on Stat. 675.) But when one act points out a particular punishment for an offence, and a subsequent act prescribes a different punishment, the latter is held to control the former, and supply the sole rule to be administered. *Nichols* v. *Squires*,

(5 Pick. 168); *Commonwealth* v. *Kimball*, (21 Pick. 373.) *Rex* v. *Cator*, (4 Burr. 2026.) In the first of these cases, the court say, where the legislature imposes a second penalty for an offence, either larger or smaller than the former one, the party cannot be allowed to sue for either at his option, but is confined to the one last enacted. This, it is to be observed, was a civil action for a penalty, (1 Pick. 168,) and the same rule obtains in all *qui tam* actions, or those sounding in tort. (3 Wils. 308, and cases cited.) The supreme court of Massachusetts repeat the doctrine with emphasis, in the case of an indictment, punishable by fine; there the forbidden act was prohibited by the first statute, under a penalty of $20, and the second prohibited the same act, under the penalty of not more than $20, nor less than $10, and the court held that the prosecution must be under the subsequent act alone. (21 Pick. 373.)

It is of no moment, whether or no, in this case, the provisions in the act of 1842 be held a technical repeal of that part of the 50th section of the act of 1799, applicable to the subject. The latter enactment controls the former, and supplies the only punishment that can be inflicted for the offence pointed out by it. *Howe* v. *Starkweather*, (17 Mass. R. 243.)

The facts declared upon, as the foundation for the penalty demanded by this action, then, being the same for which the defendant has already been indicted and punished, I hold that the action cannot be maintained, and that the plea is a good bar thereto, both because the United States having obtained judgment and inflicted punishment upon the defendant for an offence, they are prohibited, by general principles of law, from prosecuting him again for acts constituting the same offence, or in other words, which if proved, would call for his conviction of that offence, and because the punishment provided by the 19th sect. of the act of 1842, is not cumulative, and to be imposed in addition to that prescribed by the 50th section of the act of 1799, but is *quoad hoc* a substitution for a repeal of the latter.

Judgment is accordingly given for the defendant, and against the demurrant.

Digest of American Cases.

Selections from 3 Howard's (U. S. Sup. Co.) Reports, Continued.

CONSTITUTIONAL LAW.

A law of the state of Indiana, passed after an execution was issued, requiring that property should be appraised and not sold unless it brought a certain amount, could not avoid the deed of the sheriff in a case where the property was sold without appraisement. *Cantly's Lessee* v. *Ewing*, 707.

2. Under the acts of congress and of the state of Ohio, relating to the surrender and acceptance of the Cumberland road, a toll charged upon passengers travelling in the mail stages, without being charged also upon passengers travelling in other stages, is against the contract, and void. *Neil, Moore & Co.* v. *The State of Ohio*, 720.

3. It rests altogether in the discretion of the postmaster-general, to determine at what hours the mail shall leave particular places and arrive at others, and to determine whether it shall leave the same place only once a day, or more frequently. *Ib.*

4. It is not, therefore, the mere frequency of the departure of carriages carrying the mail, that constitutes an abuse of the privilege of the United States, but the unnecessary division of the mail-bags amongst a number of carriages in order to evade the payment of tolls. *Ib.*

CONSTRUCTION OF STATUTES.

The court, in construing an act, will not consider the motives or reasons, or opinions, expressed by individual members of congress, in debate, but will look, if necessary, to the public history of the times in which it was passed. *Aldridge et al* v. *Williams*, 1.

2. The mere construction of a will by a state court, does not, as the construction of a statute of the state, constitute a rule of decision for the court, of the United States. If such construction by a state court had been long acquiesced in, so as to become a rule of property, this court would follow it. — *Lane* v. *Vick*, 464.

3. A clause of forfeiture in a law is to be construed differently from a similar clause in an engagement between individuals. A legislature can impose it as a punishment, but individuals can only make it a matter of contract. — *State of Maryland* v. *Baltimore and Ohio Railroad Company*, 534.

4. Being a penalty imposed by law, the legislature has a right to remit it. *Ibid.*

5. Statutes *in pari materia* should be taken into consideration in construing a law. If a thing contained in a subsequent statute be within the reason of a former statute, it shall be taken to be within the meaning of that statute. *United States* v. *Freeman*, 556.

6. And if it can be gathered from a subsequent statute *in pari materia* what meaning the legislature attached to the words of a former statute, this will amount to a legislative declaration of its meaning, and will govern the construction of the first statute. *Ibid.*

7. The meaning of the legislature may be extended beyond the precise words used in the law, from the reason or motive upon which the legislature proceeded, from the end in view, or the purpose which was designed; the limitation of the rule being, that to extend the meaning to any case not included within the words, the case must be shown to come within the same reason upon which the law-maker proceeded, and not a like reason. *Ibid.*

8. In affirmative statutes, such parts of the prior as may be incorporated into

the subsequent statute, as consistent with it, must be considered in force. *Davies* v. *Fairbairn*, 636.

9. If a subsequent statute be not repugnant in all its provisions to a prior one, yet if the latter statute clearly intended to prescribe the only rules which should govern, it repeals the prior one. *Ibid.*

10. Under the application of these rules, the law of Virginia, passed in 1776, authorizing the mayor of the city to take the acknowledgment of a feme covert to a deed, is not repealed by the act of 1785, or that of 1796. *Ibid.*

11. The act of congress of the 29th April, 1816, confirming certain claims to land to the extent of a league square, restricted it to that quantity, and cannot be construed as confirming the residue. *United States* v. *King et al.*, 773.

EVIDENCE.

When a party to negotiable paper has given it value and currency by the sanction of his name, he shall not afterwards invalidate it, by showing, upon his own testimony, that the consideration on which it was executed was illegal.—*Henderson* v. *Anderson*, 73.

2. In the trial of a cause for the seizure of goods for the violation of the revenue laws, the officers who made the seizure are competent witnesses.—*Taylor et al.* v. *The United States*, 197.

3. A bill of lading, entry, and owner's oath, concerning other goods than those seized, may be admitted as a link in the chain of evidence to show a privity between the parties to commit a fraud upon the revenue. *Ibid.*

4. Where a general objection is made in the court below, to the reception of testimony, without stating the grounds of the objection, the court consider it as vague and negatory; nor ought it to have been tolerated in the court below. *Camdem* v. *Doremus*, 515.

EXECUTION.

A law of the state of Indiana, directing "that real and personal estate, taken in execution, shall sell for the best price the same will bring at public auction and outcry, except that the fee-simple of real estate shall not be sold to satisfy any execution or executions, until the rents and profits for the term of seven years of such real estate shall have been first offered for sale at public auction and outcry; and if such rents and profits will not sell for a sum sufficient to satisfy such execution or executions, then the fee-simple shall be sold," is not merely directory to the sheriff, but restrictive of his power to sell the fee-simple. *Gantly's Lessee* v. *Ewing*, 707.

2. If he sells the fee-simple without having previously offered the rents and profits, his deed is void. *Ibid.*

3. A marshal is not authorized by law to receive anything, in discharge of an execution, but gold and silver, unless the plaintiff authorizes him to receive something else. *McFarland* v. *Gwin*, 717.

4. The case of Griffin et al. *v.* Thompson, 2 Howard, 244, reviewed and confirmed. *Ibid.*

5. A marshal, like a sheriff, is bound, after the expiration of his term of office, to complete an execution which has come to his hands during his term; and an execution is never completed until the money is made and paid over to the plaintiff, if it is practicable to make it. *Ibid.*

HABEAS CORPUS.

Neither the supreme court, nor any other court of the United States, or judge thereof, can issue a *habeas corpus* to bring up a prisoner, who is in custody under a sentence of execution of a state court, for any other purpose than to be used as a witness. *Ex parte Dorr*, 103.

JURISDICTION.

The circuit court of the United States has jurisdiction where a promissory note is made by a citizen of one state payable to another citizen of the same state or bearer, and the party bringing the suit is a citizen of a different state; although upon the face of the note it was expressed to be for the use of persons residing in the state in which the maker and payee lived.—*Bonaffe* v. *Williams*, 574.

2. Where the citizenship of the parties gives jurisdiction, and the legal right to sue is in the plaintiff, the court will not inquire into the residence of those who may have an equitable interest in the claim. *Ibid.*

3. This court has not jurisdiction, under the 25th section of the Judiciary

act of a question whether an ordinance of the corporate authorities of New Orleans does or does not impair religious liberty. *Permoli* v. *First Municipality*, 589.

4. The Constitution of the United States makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws. *Ibid.*

LIBEL.

In an action for a libel it is not indispensable to use the word "maliciously" in the declaration. It is sufficient if words of equivalent power or import are used. *White* v. *Nichols*, 266.

2. Every publication, either by writing, printing or pictures, which charges upon, or imputes to, any person that which renders him liable to punishment, or which is calculated to make him infamous, or odious, or ridiculous, is *prima facie* a libel, and implies malice in the author and publisher towards the person concerning whom such publication is made. *Ibid.*

3. Proof of malice cannot, in these cases, be required of the party complaining, beyond the proof of the publication itself; justification, excuse, or extenuation, if either can be shown, must proceed from the defendant. *Ibid.*

4. Privileged commnnications are an exception; and the rule of evidence, as to such cases, is so far changed as to require of the plaintiff to bring home to the defendant the existence of malice as the true motive of his conduct.

Privileged communications are of four kinds:

1. Whether the author and publisher of the alleged slander acted in the *bona fide* discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests.

2. Any thing said or written by a master in giving the character of a servant who has been in his employment.

3. Words used in the course of a legal or judicial proceeding, however hard they may bear upon the party of whom they are used.

4. Publications duly made in the ordinary mode of Parliamentary proceedings, as a petition printed and delivered to the members of a committee appointed by the House of Commons to hear and examine grievances. *Ibid.*

5. But in these cases the only effect of the change of the rule is to remove the usual presumption of malice. It then becomes incumbent on the party complaining to show malice, either by the construction of the spoken or written matter, or by facts and circumstances connected with that matter, or with the situation of the parties, adequate to authorize the conclusion. *Ibid.*

6. Proof of express malice, so given, will render the publication, petition, or proceedings, libellous. Falsehood and the absence of probable cause will amount to proof of malice. *Ibid.*

7. The jury being the tribunal to determine whether this malice did or did not mark the publication, the alleged libel should be submitted to them, and the court below erred in withholding it. *Ibid.*

LIMITATIONS.

Where there has been a tenancy in common, if the tenants in possession only claim the undivided interest which was held by their immediate granters, it is not adverse to the remaining part of the title, and such persons cannot avail themselves of the statute of limitations. *Clymers Lessee* v. *Dawkins*, 674.

2. But if the occupants entered into possession and held the land for more than twenty years before the commencement of the suit, by a purchase and claim thereof in entirety and severalty, and not an undivided part thereof in co-tenancy, it is an adverse possession, and the Statute of Limitation is a good plea. *Ibid.*

MAISON ROUGE.

The certificate of survey alleged to have been given by Trudeau, on the 14th of June, 1797, and brought forward to sustain a grant to the Marquis de Maison Rouge, declared to be antedated and fraudulent. *United States* v. *King et al.* 773.

2. Leaving the certificate out of the case, the instruments executed by the Baron de Carondelet in 1795 and 1797, have not the aid of any authentic survey to ascertain and fix the limits of the land and to determine its location. *Ib.*

MANDAMUS.

Where a party has resorted to,

and obtained a *mandamus*, he cannot afterwards proceed in another suit for the same cause of action. *Kendall* v. *Stokes et al.*, 87.

MARSHAL.

A marshal is not authorized by law to receive anything, in discharge of an execution, but gold and silver, unless the plaintiff authorizes him to receive something else. *McFarland* v. *Gwin*, 717.

2. The case of Griffin et al. *v.* Thompson, 2 Howard, 244, reviewed and confirmed. *Ib.*

3. A marshal, like a sheriff, is bound, after the expiration of his term of office, to complete an execution which has come to his hands during his term; and an execution is never completed until the money is made and paid over to the plaintiff, if it is practicable to make it. *Ib.*

MARINE CORPS.

A brevet field-officer of the marine corps is not entitled by law to brevet pay and rations, by reason of his commanding a separate post or station, if the force under his command would not entitle a brevet field-officer of infantry of a similar grade to brevet pay and rations. *United States* v. *Freeman*, 556.

2. The act of 1834, ch. 132, does not repeal the first section of the act of 1818, regulating the pay and emoluments of brevet officers. *Ib.*

3. The fifth section of the act of 30th June, 1834, is a repeal of the joint resolution of the two houses of congress of the 25th of May, 1832, respecting the pay and emoluments of the marine corps. *Ib.*

4. By force of the army regulation No. 1125, authorizing the issue of double rations to officers commanding departments, posts, and arsenals, a brevet field-officer of marines is entitled to double rations. But the fact must be shown that he had such a command of a post or arsenal at which double rations had been allowed according to the army regulations. *Ib.*

5. The fact of appropriations having been made by congress for double rations does not determine what officers are entitled to them. *Ib.*

6. A brevet field-officer of the marine corps, commanding a separate post without a command equal to his brevet rank, is not entitled to brevet pay and emoluments. But if such brevet officer is a captain in the line of his corps, and in the actual command of a company, whether he is in the command of a post or not, he is entitled to the compensation given by the 2d section of the 2d March, 1827. *Ib.*

PRACTICE.

There was a judgment against an administrator of assets *quando acciderint*.

2. Upon this judgment a *scire facias* was issued, containing an averment that goods, chattels, and assets had come to the hands of the defendant.

3. Upon this *scire facias* there was a judgment by default; execution was issued, and returned "*nulla bona*."

4. A *scire facias* was then accorded against the administrator to show cause why the plaintiff should not have execution "*de bonis propriis*."

5. It was then too late to plead that the averment in the first *scire facias* did not state that assets had come into the hands of the administrator subsequent to the judgment *quando*. *Dickson* v. *Williamson*, 57.

6. A judgment by default against an executor or administrator is an admission of assets to the extent charged in the proceeding against him. *Ib.*

7. If a party fail to plead matter in bar to the original action, and judgment pass against him, he cannot afterwards plead it in another action founded on that judgment; nor in a *scire facias*. *Ib.*

8. A demurrer reaches no further back than the proceedings remain in *fieri*, or under the control of the court. *Ib.*

9. Before a case can be dismissed under the 21st rule, regulating equity practice, there must exist, in the technical sense, a plea or demurrer on the part of the defendant, which the plaintiff shall not have replied to or set down for hearing before the second term of the court after filing the same. *Poultney et al.* v. *City of Lafayette et al.*, 81.

10. The complainant, if he chooses, may go to the hearing on bill and answer. *Ib.*

11. After a reference, an award, and the reception of the money awarded, another suit cannot be maintained on the original cause of action, upon the ground that the party had not proved before the referee, all the damages he had sustained, or that his damage exceeded the amount which the arbitrator awarded. *Kendall* v. *Stokes*, 87.

12. Where a party has a choice of remedies for a wrong done, selects one, proceeds to judgment, and reaps the fruits of his judgment, he cannot afterwards proceed in another suit for the same cause of action. *Ib.*

13. This is especially true where the party has resorted to a *mandamus*, because it is not issued where the law affords a party any other adequate mode of redress. To allow him to maintain another suit for the same cause of action would be inconsistent with the decision of the court which awards the *mandamus*. *Ib.*

14. An application for a writ of error, prayed for without the authority of the party concerned, but at the request of his friends, cannot be granted. *Ex parte Dorr*, 103.

15. The objection of multifariousness can be taken by a party to the bill only by demurrer, or plea, or answer, and cannot be taken at the hearing of the cause. But the court itself may take the objection at any time — at the hearing or otherwise. The objection cannot be taken by a party in the appellate court. *Oliver* v. *Piatt*, 333.

16. Where exceptions are taken to a master's report, it is not necessary for the court formally to allow or disallow them on the record. It will be sufficient if it appears from the record that all of them have been considered by the court and allowed or disallowed, and the report reformed accordingly. *Ib.*

17. After a case has been decided upon its merits, and remanded to the court below, if it is again brought up on a second appeal, it is then too late to allege that the court had not jurisdiction to try the first appeal. *Washington Bridge Co.* v. *Stewart*, 413.

18. The supreme court has no power to review its decisions, whether in a case at law or in equity. A final decree in chancery is as conclusive as a judgment at law. *Ib.*

19. An affirmance by a divided court, either upon a writ of error or appeal, is conclusive upon the rights of the parties. *Ib.*

20. Where the court below awarded a *supersedeas* to stay execution, but afterwards revoked that order on account of the insufficiency of the security, the supreme court will not interfere by granting a *supersedeas*. *Black* v. *Zacharie*, 453.

21. Nor will it interfere on account of the bankruptcy of the defendant, because the assignee of the bankrupt has his remedy in the circuit court. *Ib.*

22. Where a general objection is made in the court below to the reception of testimony, without stating the grounds of the objection, this court considers it as vague and nugatory; nor ought it to have been tolerated in the court below. *Camden* v. *Doremus*, 515.

23. If the citation be signed by the clerk, and not by a judge of the circuit court, or a justice of the supreme court, the case will, on motion, be dismissed. *The United States* v. *Hodge*, 534.

24. The 38th rule of court forbids the insertion of the whole of the charge of the court to the jury in a general bill of exceptions, but requires that the part excepted to shall be specifically set out. *Stimpson* v. *West Chester Railroad Company*, 553.

25. This court has not the power to correct any errors or omissions which may have been made in the circuit court in framing the exception; nor can it regard any part of the charge as the subject-matter of revision, unless the judges, or one of them, certify under his seal, that it was excepted to at the trial. *Ib.*

26. If the omission of a part of the charge, which was in fact embraced in the exception, is a mere clerical error, the party will be entitled to a *certiorari*, upon producing a copy of the exception, properly certified. *Ib.*

27. But in no case can the exception certified under the seals of the judges of the circuit court be altered or amended. *Ib.*

28. Where this court hath affirmed the title to lands in Florida, and referred, in its decree to a particular survey, it would not be proper for the court below to open the case for a rehearing, for the

purpose of adopting another survey. *Chaires* v. *The United States*, 611.

29. The court below can only execute the mandate of this court. It has no authority to disturb the decree, and can only settle what remains to be done. *Ib.*

30. A court is not bound to give instructions to the jury in the terms required by either party; it is sufficient if so much thereof are given as are applicable to the evidence before the jury, and the merits of the case as presented by the parties. *Clymer's Lessee* v. *Dawkins*, 674.

31. When an issue is directed by a court of chancery, to be tried by a court of law, and, in the course of the trial at law, questions are raised and bills of exceptions taken, these questions must be brought to the notice and decision of the court of chancery which sends the issue. *Brockett* v. *Brockett*, 691.

32. If this is not done, the objections cannot be taken in an appellate court of chancery. *Ib.*

33. If the chancery court below refers matters of account to a master, his report cannot be objected to in the appellate court, unless exceptions to it have been filed in the court below in the manner pointed out in the 73d chancery rule of this court. *Ib.*

34. Where a cause has been pending in this court for two terms, a writ of *certiorari* sent down at the instance of the defendant in error, to complete the record, and the defendant in error then moves to dismiss the case upon the ground that the clerk of a state court issued the writ of error, and one of the judges of that court signed the citation, the motion comes too late. *McDonogh* v. *Millaudon*, 693.

35. Where the matter in dispute is below the amount necessary to give jurisdiction to this court, the writ of error must be dismissed, on motion. *Winston* v. *The United States*, 771.

36. Where a bill was filed on the equity side of the court below, to enjoin the marshal from levying an execution upon certain property, which execution was for a less sum than $2000, an appeal from a decree dismissing the bill will not lie to this court, although the entire value of the property may be more than $2000. *Ross* v. *Prentiss*, 771.

37. The jurisdiction of the court does not depend upon the amount of any contingent loss or damage which one of the parties may sustain by a decision against him, but upon the amount in dispute between them. *Ib.*

RECEIVER OF PUBLIC MONEY.

The felonious taking and carrying away the public moneys in the custody of a receiver of public moneys, without any fault or negligence on his part, does not discharge him and his sureties, and cannot be set up as a defence to an action on his official bond. *The United States* v. *Prescott*, 578.

TENANCY IN COMMON.

The entry and possession of one tenant in common is ordinarily deemed the entry and possession of all the tenants; and this presumption will prevail in favor of all, until some notorious act of ouster or adverse possession by the party so entering is brought home to the knowledge or notice of the others. When this occurs, the possession is from that period treated as adverse to the other tenants. *Clymer's Lessee* v. *Dawkins*, 674.

2. Such a notorious ouster or adverse possession may be by any overt act *in pais* of which the other tenants have due notice, or the assertion in any proceeding at law of a several and distinct claim or title. If an attempt be made to obtain a partition, although the legal proceedings by which it is effected may be invalid or defective, still, being a matter of public notoriety, the co-tenant is bound at his peril to take notice of the claim to adverse possession thus set up. *Ib.*

3. If the tenants in possession only claim the undivided interest which was held by their immediate grantors, it is not adverse to the remaining part of the title, and such persons cannot defend themselves in ejectment by giving in evidence an outstanding title elder than that under which they claim; nor can they avail themselves of the statute of limitations. *Ib.*

Notices of New Books.

On Punishments and Prisons; written by His Majesty the King of Sweden and Norway. Translated from the second Swedish edition, by A. May. London: D. Nutt, 158 Fleet Street. 1844. 8vo. pp. 162.

Though the imprint of this book is London, yet the type and colophon show that it was printed at Stockholm. Originally written in Swedish, it has already been twice translated into German, twice into French, and once into Norwegian. It deserves to be translated into every language of the globe.

The author, Oscar, at the time of its first appearance, was Crown Prince of Sweden. He is now the King. Such words from a throne find no parallel in history. All the productions of the sixteen royal authors of England, and the six of Scotland, mentioned in Walpole's catalogue, could not confer the same true honor as these few pages; not the "prettie versse" of Henry VI. the volume of Henry VIII., which has secured to his successors on the throne the unchangeable title of *Defender of the Faith;* not the "Counterblast to Tobacco," and other writings, overflowing with puns, pedantry, vanity, scripture, and prerogative, of James I. of England; not the ballads, songs, rondeaus, and poems of the four Jameses of Scotland. These have long since met the fate which is so well pictured by Milton:

——————— and now at foot
Of heaven's ascent they lift their feet, when lo!
A violent cross wind, from either coast,
Blows them transverse ten thousand leagues awry
Into the devious air; then might you see
Cowls, hoods, and habits, with the wearers, tost,
And fluttered into rags.

But the work on *Punishments and Prisons* by a king, written in a spirit of simplicity and gentleness, with sympathy for the poor, the humble, the wicked, cannot be forgotten. It has pointed out a truly "royal road to wisdom."

The work is divided into four chapters, the first presenting general views of *Punishments*. This part breathes a benign spirit of clemency and justice. It recognizes the legislation of a country, particularly with regard to crimes, as a sure standard of the intelligence and morality at which that country has arrived. It regards moral and intellectual improvement and general happiness as the grand objects of the state. While it places the right of punishment on the high grounds of reason and justice, it directs our delighted attention to the criminal.

Punishments are classed under two great heads; *first*, those, which, in the first place, consider the afflicting and martyring of the outer senses, consequently *physical affliction*, commonly called *corporal punishments; second*, *psycologically* afflictive, commonly called *mental punishment*.

The former, or corporal punishments, says the king, may be said to have descended from the most ancient times. They had their foundation in that feeling of *revenge*, which, in former ages, was predominant in the exercise of the right of punishment in the state, and in the ignorance which then prevailed. It was necessary for Christianity to wrestle for centuries against the power of passion and prejudice, before it could mitigate this barbarism and clothe the remains of heathen ignorance in forms more in accordance with justice. The principle of the infliction of physically afflictive punishment reaches its height and its extreme application, in capital punishment; for beyond this limit it can no farther go.

The king then enters upon the subject of capital punishment, and, in a few sentences of serene beauty, does not hesitate to bear his testimony against it. It is undoubtedly both the right and the duty of society to punish every ac-

tion which can disturb the public system of justice; it can even, if the offender has, by a relapse, shown himself incorrigible, or if his offence is of a nature to endanger the public safety, render him incapable of again injuring other members of the community. But, asks the king wisely, does this right extend farther than to the loss of liberty, by which the object is gained? *Every punishment, which goes beyond the limit of* NECESSITY, *enters the jurisdiction of despotism and revenge.*

The suggestion, that capital punishment must be retained, less for the punishment of the criminal himself, than as a warning to others not to follow his example, is fairly met by the inquiry, whether society has the right of torturing, and finally putting to death, one of its members, in order to excite fear and horror in the rest. A well founded doubt is also expressed, whether the greater or less amount of crime depends exclusively on a greater or less application of the warning theory. Experience seems to prove, that crime is more effectually prevented by a more general enlightment, a more liberal organization of society, and easier means of gaining a livelihood. These expedients, says the king, should, in the first place, be applied, both from a feeling of humanity and policy.

Time does not permit us to follow further the king's beautiful pleading for the abolition of the punishment of death. Subscribing, as we do, to his conclusions, and admiring the enlightened benevolence which animates them, we have perused his remarks on this subject with a thrill of gratitude.

The *second* chapter relates to the rise and progress of the penitentiary or *corrective system.* A succinct history is presented of what is generally called prison discipline. Here the king recognizes the same benign principles which are his guide in the consideration of capital punishment. The grand object, he says, is *to make the law synonymous with justice and humanity.* Noble words! to be commended most earnestly to the supporters of the barbarisms of the common law.

It is to the religious zeal of the Quakers in Pennsylvania, that the king awards the true glory of first introducing the great philanthropic reform in prison discipline, which is one of the bright lights of the present age. He dwells upon the development of what is now known, throughout the civilized world, as the *Pennsylvania system.* He carefully distinguishes it from what is called the *solitary system*, in which the prisoner is doomed to absolute solitude, without the liberty of working, or opportunity for any kind of employment: a species of cruelty which finds its examples in the dungeons of the Bastille and the cells of Spielberg. The Pennsylvania system, on the contrary, affords the prisoners opportunity for work, secures to them the society of their keepers and moral instructers, and encourages the visits of other good persons. Its great and cardinal principle is the *separation* of the convicts, so that they cannot communicate with each other in any way, by word or by sign, neither seeing, hearing or touching each other. In this condition, the mind is removed from the contagion of wickedness, which fills prisons in which convicts herd together, and good influences alone are allowed to prevail. As the *separation* of the convicts is the vital principle of this system, it will be proper to call it the *separate system.*

The king passes under review, also, the great rival system, commonly called the *Auburn system*, which aims at the same object with that of Pennsylvania, the *separation* of the convicts, but secures it in a less perfect manner. At Auburn the prisoners are kept in separate cells at night, but work by day, in silence, in large rooms, in common, under the observation of guardians, whose duty it is to prevent them from communicating in any way with each other. This is sometimes called the *silent system.* But, when we consider that its leading feature is the working of the prisoners in herds or congregations, it will be more proper to designate it as the gregarious or *congregate system.* Such a system cannot present the same claims to the regard of the enlightened legislator and philanthropist as the *separate system.*

All good men, who give the subject a candid attention, must join with the king of Sweden in his tribute to Pennsylvania. "Not only," he says, "is the honor of having first applied the elevated principle of uniting improve-

ment with punishment due to the legislators of Pennsylvania, they have also, by a praiseworthy perseverance, which has not allowed itself to be cast down either by difficulties or sacrifices, laid the surest foundation hitherto known, on which the *corrective system* may reach its grand object." At this period, when, from her disgraceful neglect to pay the interest of her debt, the name of Pennsylvania has become a by-word among the nations, it is grateful to contemplate for a moment the true glory which she has reaped in the exalted field of humanity.

The *third* chapter is a full and careful *comparison between the Auburn and Philadelphia penitentiary systems*, under the following different heads: 1st, their power of punishment, for the just chastisement of the criminal, and useful warning to others; 2d, their influence on the moral improvement and health of the prisoner; 3d, possibility of continuing the proper observance of the order prescribed; 4th, the expense of the prisoner's dwelling, support and guarding; 5th, whether the system promotes or hinders the possibility of a compensation, by means of the prisoner's labor, either for the whole, or, at least, a part of the expense of the state; 6th, the effects of the system on the future prospects in society of those liberated.

After a candid examination of these important points, the conclusion is against the Auburn or *congregate* system. The Pennsylvania system is regarded as, in the highest degree, applicable to those individuals whose improvement is considered possible, and who, after having gone through their punishment, are again to enter society; and it is urgently recommended, particularly for all places of confinement before and during trial, and for all houses of correction and jails, to which prisoners are condemned for limited periods. The objection which is so often urged against the separate system, that it endangers the health, is carefully considered.

The reader who peruses the king's remarks on these two systems, conceived in a spirit of truth, candor, and of Christian love, may be reminded, as by contrast, of the bitter, illiberal and ignorant warfare which has been waged by the Boston Prison Discipline Society against a system which now unites, in its support, the science and humanity of the civilized world. The eyes of our community should be unsealed at last with regard to the true merits of the benign system which, for so long a period, has been the mark for such "odd, perverse antipathies." The king says, in allusion to public opinion in the United States, "the principle of *separation*, so important to the state and to humanity, was examined in every point of view, by the most distinguished writers, and found in Mr. Edward Livingston, *of Boston*, a most zealous and enlightened advocate." It is true, that Mr. Livingston did yield to the separate system his powerful support, but no such voice came *from Boston!*

The *fourth* and concluding chapter is *on the application of the penitentiary system in Sweden*. Time will not allow us to follow the king in his numerous and important practical suggestions under this head. He supposes as a starting point, that the Pennsylvania system, calculated on the complete separation of the prisoners, should form the foundation for all radical improvement in prison discipline, as that system is the most efficacious hitherto known, in uniting the possible improvement of the prisoner with his effectual punishment. He would, however, restrain its application, at first to criminals who are condemned for a period under six years; thinking that experience has not yet fully determined whether this treatment can be extended beyond this period, without detriment to the health.

And here we part from the king with gratitude. He is the son of one of the marshals of the empire, Bernadotte, the elected king of Sweden; but the author of this little book of humanity and wisdom, inspires a warmer glow of admiration than the commander of the centre in the victory of Austerlitz, or of the timely succors that hurried the close of the giant-struggle of Leipzig. He sits on a throne which has been illustrated by two of the greatest sovereigns of modern Europe; but his is a truer glory than that of Gustavus Vasa in the mines of Dalecarlia, or of Gustavus Adolphus on the field of Lutzen.

C. S.

Notch-Pot.

It seemeth that this word Notch-pot, is in English a pudding, for in this pudding is not commonly put one thing alone, but one thing with other things put together. — *Littleton*, § 287, 176 a.

The following observation was made, upon reading the account of Sir Samuel Romilly, in a late number of the Law Reporter, by one of those strong minds which take hold of a train of thought with the same spirit with which they would undertake to cut down a tree, — a determination to make a business of it. "Sir Samuel Romilly, by means of his industry, integrity, and sound and correct principles, became truly a great man in most respects; but he failed in one most important point. He never, perhaps, was trained in the school of adversity. Certainly, he never learned to sustain himself under severe tribulations, or he never would have taken his own life."

Governor Pratt, of Maryland, has pardoned Peter Watkins, who was convicted at the late term of the city court, of assault with intent to kill a girl named Elizabeth Hill, by throwing her out of the window of a house in Wilk street, near Caroline, some months since. Watkins has never been sentenced. The pardon is a conditional one; he is to pay all the expenses of the court, and enlist in the United States navy!

At a late meeting of the members of the Law School at Cambridge, resolutions highly complimentary to Professor Greenleaf, for the manner in which he has performed the whole duties of instruction since the death of Judge Story, were unanimously adopted. It was our intention to have inserted them at length in the present number, but we are obliged to omit them, with several other articles of intelligence.

The January number of the Christian Examiner contains an article by Charles Sumner, Esq., entitled "Prisons and Prison Discipline," in which he espouses the side of the separate, or Pennsylvania system.

Benjamin R. Curtis, Esq., has been appointed a Fellow of Harvard College, in the place of Judge Story.

We understand that the Dane Professorship, which was vacated by the death of Judge Story, has not yet been filled.

Obituary Notices.

Died — On the 17th of December last, at his chambers, 2 Mitre Court Buildings, London, of consumption, John William Smith, Esq., in the thirty-eighth year of his age. The names of leading orators at the bar are ever familiar to the public, but there is another eminent class, whose fame, though often more lasting, scarcely passes beyond the knowledge of the legal profession, — we mean the writers upon law. The subject of this notice is a strong instance of this. His death has occurred without general remark; and yet in him has perished, by an early fate, one of the greatest authors on the subject of the common law, since the days of Blackstone. He was called to the bar by the society of the Inner Temple, May 2, 1834, and was latterly attaining extensive practice on the Oxford circuit, and in the courts of Westminster. But he has already acquired a high reputation by his "Compendium of Mercantile Law," a perfect model of purity of style, clearness of expression, and extensive knowledge in legal compositions. His other principal work was one entitled "A Selection of Leading Cases," a book now essential to all students, and, indeed, to every one practising at the common law bar. Mr. Smith also wrote several less extensive treatises; all his productions went through several editions. The extreme toil and energy that these labors required, were too much for his delicate constitution, and during the last year, it was evident to the eyes of his brethren in the courts, that the learned gentleman was rapidly declining under his exertions. But no warning or advice could induce him to desist, and nearly to the last he was to be seen at Westminster, with business on hand, and yet a mere shadow. His untimely demise is the subject of deep and general regret to all belonging to the law. His amiable disposition and unobtrusive manners had endeared him to the bar, and his genius was such as to render him an irreparable loss.

In Fryeburg, Maine, on the 27th of December last, Hon. Judah Dana, aged seventy-three years. He was born at Pomfret, Vermont, to which place his parents removed from Pomfret, Connecticut, in 1771. His mother was a daughter of General Israel Putnam. He was graduated at Dartmouth College, in 1795, and settled in Fryeburg, where he successively held the offices of attorney for the government, judge of probate, and judge of the circuit common pleas, for many years before the separation of Maine and Massachusetts. After that separation, he held several offices under the state government of Maine. In 1837 he was appointed to the United States senate, to fill a vacancy. He died in the Christian faith.